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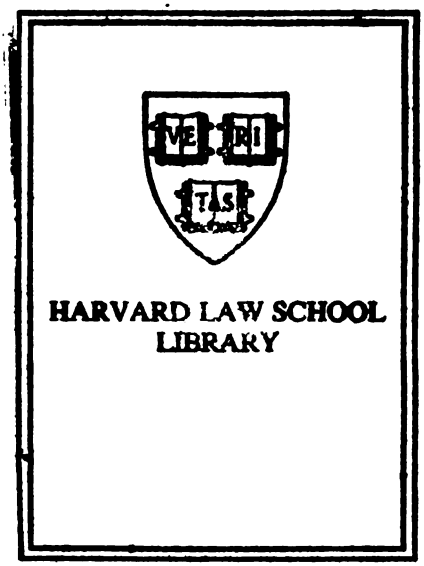

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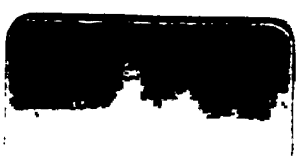

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MICHIGAN REPORTS.

REPORT OF CASES

DETERMINED IN THE

SUPREME COURT OF MICHIGAN

FROM

OCTOBER 26, 1875, TO APRIL 18, 1876.

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SUPREME COURT OF MICHIGAN.

[1] THOMAS M. COOLEY, Chief Justice.
JAMES V. CAMPBELL,
ISAAC MARSTON,
[2] BENJAMIN F. GRAVES,
} Associate Justices.
ANDREW J. SMITH, Attorney General.

CIRCUIT JUDGES.

FIRST CIRCUIT,
DANIEL L. PRATT.

SECOND CIRCUIT,
HENRY H. COOLIDGE.

THIRD CIRCUIT,
CORNELIUS J. REILLY.

FOURTH CIRCUIT,
GEORGE M. HUNTINGTON.

FIFTH CIRCUIT,
PHILIP T. VAN ZILE.

SIXTH CIRCUIT,
AUGUSTUS C. BALDWIN.

SEVENTH CIRCUIT,
JOSIAH TURNER.

EIGHTH CIRCUIT,
LOUIS S. LOVELL.

NINTH CIRCUIT,
JOSIAH L. HAWES.

TENTH CIRCUIT,
WILLIAM S. TENNANT.

ELEVENTH CIRCUIT,
DANIEL GOODWIN.

TWELFTH CIRCUIT,
WILLIAM D. WILLIAMS.

THIRTEENTH CIRCUIT,
REUBEN HATCH, JR.

FOURTEENTH CIRCUIT,
AUGUSTINE H. GIDDINGS.

FIFTEENTH CIRCUIT,
EDWIN W. KEIGHTLEY.

SIXTEENTH CIRCUIT,
EDWARD W. HARRIS.

SEVENTEENTH CIRCUIT,
BIRNEY HOYT.

EIGHTEENTH CIRCUIT,
SANFORD M. GREEN.

NINETEENTH CIRCUIT,
HARRISON H. WHEELER.

TWENTIETH CIRCUIT,
DAN J. ARNOLD.

TWENTY-FIRST CIRCUIT,
HENRY HART.

JUDGE OF THE SUPERIOR COURT OF DETROIT,
LYMAN COCHRANE.

JUDGE OF THE SUPERIOR COURT OF GRAND RAPIDS,
JOHN T. HOLMES.

RECORDER OF THE CITY OF DETROIT,
GEORGE S. SWIFT.

[1] From January 1, 1876.
[2] Chief Justice till December 31, 1875.

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OCTOBER TERM, 1875.

(CONTINUED FROM VOL. XXXII.)

The People on the relation of Bernard Youngblood v. George H. Stellwagen.

Town treasurer: Residence: Territory detached: Town limits: Vacancy. Where one who has been elected town treasurer is, during his term, by an act of the legislature detaching from the township and annexing to an adjoining city the territory within which such officer resides, placed outside the town limits, and the town board thereupon appoint another town treasurer in his place, such prior officer is not thereafter entitled to demand and receive of the county treasurer moneys in his hands belonging to the township.

Heard and decided October 26.

Application for *Mandamus*.

The petition showed that relator was elected treasurer of the township of Hamtramck, in Wayne county, at the spring election of 1875, and qualified as such, and has ever since been and still is acting in that capacity; that the respondent as county treasurer has collected, under *Act No. 228 of Session Laws of 1875*, a large amount of money which is credited to the contingent fund of said township, and which under said act belongs to said township and to said fund; that relator has made demand for the same, which respondent refuses to comply with; and prays for *mandamus* to compel respondent to pay said moneys over to relator as township treasurer.

John Atkinson, for the relator, in presenting the petition and asking for an order to show cause, stated to the

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court that the relator resided within the territory which, by *Act No. 397 of the Laws of 1875*, was detached from Hamtramck and annexed to the city of Detroit, and called the attention of the court to that act; he also stated that the town board, after the taking effect of said act, met and appointed a new town treasurer in relator's place.

THE COURT denied the writ on the ground that the statement of the counsel, that the party is by said act placed outside the town limits, shows *prima facie* that he is not treasurer and that he has no right to the moneys.

The People on the relation of Alexander W. Copland v. The Directors of the Minong Mining Company.

Corporations: Directors: Removal: Declaring office vacant. One who is named as a director in the articles of incorporation, and who has acted as such, cannot be removed by parol, or by the individual action of other directors; and proceedings by the board without notice to declare the office vacant are without jurisdiction.

Corporations: Consolidation: Stockholders. A person who is once entitled to stock in a corporation can only be deprived of it by transfer, or by such forfeiture for non-payment of lawful assessments as is authorized by law; and a stockholder in one of two mining companies which are consolidated becomes by the consolidation under the statute (*Comp. L. 1871, §§ 2899-5*) a stockholder in the new company.

Heard and decided October 26.

Michael McHugh v. Delamere Brown.

Evidence: Written instruments: Execution. In an action upon a warranty of title free from incumbrances, of a span of horses sold by defendant to plaintiff, it is error to receive in evidence against objection a note and

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mortgage purporting to be executed by defendant without any proof of their execution.

Heard and decided October 28.

Error to St. Clair Circuit.

This was assumpsit, the declaration containing, besides the common counts, a special count, alleging in substance, though quite informally, that plaintiff purchased a span of horses of defendant for five hundred dollars, which plaintiff warranted to be free from incumbrances, and that in fact there existed an incumbrance upon them in favor of one Daniel Ryan for five hundred dollars. On the trial, plaintiff, to prove the incumbrance, offered in evidence a promissory note and chattel mortgage for one hundred dollars and purporting to be executed by defendant to Daniel Ryan. Defendant's counsel objected on the ground that their execution had not been proved, but the court admitted them. Plaintiff having recovered judgment, defendant brought error and alleged this ruling, among others, as error.

James J. Barry, Miles & Coe and *Hoyt Post*, for plaintiff in error.

Chadwick & Potter, for defendant in error.

PER CURIAM:

We think the court erred in admitting the note and mortgage in evidence without any proof of their execution, and for this error, and without passing on any of the other questions suggested, the judgment must be reversed, with costs, and a new trial granted.

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Mary A. Roberts v. Michael Fitzgerald.

Highways: Obstructions: Declaration: Special damages. In an action to recover damages suffered from an unlawful obstruction of a highway, no recovery can be had by reason of a third person passing over plaintiff's land to get around the obstruction, in the absence of a special allegation of such damage or of the averment of facts and circumstances from which such a consequence would naturally result.

Highways: Obstructions: Damages: Plaintiff's own acts. One cannot recover for being compelled by highway obstructions to travel several miles around by another highway, where such obstructions are partly of her own erection and where but for her part therein there would be ample room for passage.

Charge to the jury: Exception: Practice. A charge to the jury to which no exception was taken will not be considered on error.

Heard October 12. Decided November 2.

Error to St. Clair Circuit.

Henry M. Cheever, for plaintiff in error.

Atkinson & Atkinson, for defendant in error.

PER CURIAM:

The plaintiff sued to recover damage she claimed to have suffered by the defendant's obstruction of a highway.

The obstruction as alleged consisted in fencing in and across the highway near to certain land of the plaintiff. The declaration set up that for more than twenty years prior to the commencement of the suit the highway in question had been, and still was, a common public traveled highway, and was the main outlet or passage way for the plaintiff in the use and enjoyment of her said land, and without which she was injured in the use and occupation of it; that by reason of such obstruction she was prevented from passing upon or using said highway, and was greatly annoyed and incommoded in the use, possession and enjoyment of her farm; that she was compelled, in order to obtain ingress and egress, to travel several miles further by another high-

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way, and to expend much money in traveling and procuring teams therefor.

The general issue being pleaded, the cause was tried by jury, who found for defendant, and the plaintiff brought error. The only objections to the proceedings relate to the directions and rulings of the judge in charging.

There was evidence tending to show that one Campbell was compelled to deviate and pass round upon the plaintiff's land, and the plaintiff requested a charge that if any one was compelled by reason of the fence to go around upon her land, it was matter of special damage for which she could recover. This was refused, and the refusal is assigned for error. The ruling was right. There was no suggestion in the declaration that any damage would be claimed on account of the passage of third persons over the plaintiff's land to avoid the fence, and such damage could not be regarded as a necessary consequence of the facts and circumstances set forth. We need not consider how the point would have appeared if the declaration had afforded ground for it.

There was evidence tending to show that defendant made a fence which occupied and obstructed a part of the highway, and also evidence tending to show that the plaintiff placed her fence in the highway there, and thereby occupied and obstructed it from four to twelve feet. The defendant requested, and the court charged, that if the plaintiff could have passed if she had not moved her own fence into the road she could not recover. This ruling is complained of, but we think the objection untenable. If she helped to seal up the road, and in doing what she did precluded her own passage, she became the author of the particular injury she alleges in her declaration.

It is lastly objected that the court instructed the jury, that unless the highway had been used and traveled twenty years prior to the alleged obstruction by defendant the plaintiff could not recover. The proposition in the charge does not appear to have been given as a direction to the jury, but

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seems to have been mentioned rather as something conceded, and there is nothing in the case to indicate that there was any dispute in regard to the existence of the highway, or in regard to its having been used and traveled for more than twenty years. The declaration and affidavit for *capias* both stated that it had been used and traveled for the period mentioned. But aside from this, this part of the charge was not excepted to, and consequently there is not the least basis in the record for the allegation of error.

The judgment should be affirmed, with costs.

The Michigan Central Railroad Company v. William W. Burrows and others.

Railroads: Transporting freight: Diligence: Usual and ordinary demands: Extraordinary contingencies. Railroad companies are bound to have all reasonable and necessary facilities and appliances for conducting and carrying on in a prompt, skillful and careful manner the business in which they are engaged, and for transporting without unreasonable delay the usual and ordinary quantity of freight offered them for transportation, or which might reasonably and ordinarily be expected; but they are not bound to be prepared for unusual and extraordinary contingencies, such as the great Chicago fire, which no ordinary prudence or foresight could reasonably foresee or anticipate.

Unusual contingencies: Diligence: Despatch: Average time. Where an unusual contingency has arisen which unexpectedly largely increases the business and thereby prevents the handling of freight with the usual promptness and despatch, the criterion of reasonable diligence is not the usual average rate of speed in ordinary times, but the average running time under the extraordinary and unusual circumstances existing at the time.

Negligence: Impossibilities. The law is not so absurd as to assume to hold any one responsible upon the ground of negligence for not doing that which it was practically under the circumstances impossible to do.

Railroads: Transporting freight: Preferences: Relief goods: Discrimination: Public necessity. Giving preference to relief goods sent to the sufferers by the great Chicago fire was not such a discrimination against shippers of other freight as to make carriers liable as for negligence for not forwarding freight in the order in which it was received. All general rules must yield to a great public necessity.

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MICHIGAN CENTRAL R. R. CO. *v.* BURROWS.

Negligence: Impossibilities. Where the law creates a duty or charge, and the party is unable to perform it without any default in him, and has no remedy over, then the law will in general excuse him.

Railroads: Fruit: Freezing: Negligent delay: Proximate cause. The freezing of apples while being transported by a subsequent carrier is not so direct and natural a result of unreasonable delay by the first carrier, as to make such first carrier liable therefor by reason of such delay.

Common carriers: Unreasonable delay: Negligence of subsequent carrier: Proximate cause. Proof of negligent delay by a subsequent carrier, and that without it the injury would have been avoided, is a complete answer to an action seeking to hold the first carrier responsible by reason of its delay for the injury to fruit by freezing while in custody of such subsequent carrier.

Heard October 13. Decided November 2.

Error to Kalamazoo Circuit.

Edwards & Sherwood and *G. V. N. Lothrop,* for plaintiff in error, to the point that the injury complained of was not the natural and proximate result of the acts charged, and defendants therefore not liable, cited: *3 Mich., 39; 14 Mich., 489; 3 Hill, 333; 6 Duer, 375; 19 Barb., 36; 1 Strobh., 524; 11 East, 60; 2 Taunt., 314; 1 Esp., 48; 13 M. & W., 738; 7 Pick., 282; 11 Metc., 542; 13 Gray, 481; 13 Ala., 490; 14 Wend., 255; 23 Wend., 525; 35 N. Y., 210; 20 Penn. St., 175; 62 Penn. St., 364; 2 Greenleaf Ev., 256; 2 Pars. Cont., 457; Story on Bail., 586; Angell on Car., 201.*

Severens, Boudeman & Turner, for defendants in error, to the same point contra, cited: *30 N. Y., 630, 564; 1 Conn., 487; 12 Conn., 410; 6 Bing., 619, 710; 4 Camp., 112; 3 Lans., 265; 7 Blackf., 497; 3 Mich., 268; 14 Mich., 489; 47 N. Y., 33; 15 Wis., 129; 20 Penn. St., 171; 2 Redf. on R., 8; 3 Kent Com., 210.*

MARSTON, J:

Defendants in error brought an action against the railroad company to recover damages claimed to arise from

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unreasonable delay on the part of the company in carrying apples from Vandalia in this state to Chicago.

It appeared that plaintiffs in the court below shipped, November 10, 1871, four car loads of apples, consigned to their agents at Minneapolis, in the state of Minnesota; that the apples were transferred by defendants at Chicago to the next carrier November 17, and arrived at Minneapolis on the evening of November 22, badly injured by frost, having been frozen while in transit from Chicago on or after November 21.

It also appeared, and was not disputed, that the tracks of the railroad company were in good condition; that the company had abundant rolling stock of every kind to do all its business, and that it had no difficulty in moving, storing and taking care of freight previous to October 8, 1871; that on the 8th of October a fire originated on the west side of the city of Chicago, and that about three hundred acres of the city were burned on that and the next day; that the depots belonging to the company caught fire from the surrounding buildings and were destroyed, as were also the tracks within three thousand feet of the depots, and also the tracks in the freight depots, thus rendering it impossible for the company to receive any freight, having neither freight houses to receive it in, nor tracks to handle it on; that the company immediately made all possible efforts to temporarily replace their tracks and buildings, drawing for such purposes their force of men from the east and west ends of their road.

It further appeared, and was not disputed, that large numbers of people in Chicago, after the fire, were suffering and destitute, and that in order to relieve their immediate wants, it became necessary to send clothing, provisions, building material, hardware, stoves and other necessary supplies known as relief goods, forward, which made the freight business threefold greater than it had been before the fire; that the company under these circumstances immediately issued orders, as soon as they were able to carry any freight, to

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give relief goods the preference, next in order fruit and perishable property, and then general merchandise.

It also appeared that at the time the apples in question were received by the defendant its line of road was greatly blocked by an accumulation of freight, occasioned by the causes already stated; that previous to the fire the running time of freight trains from Vandalia to Chicago was about twenty-four hours; that at the time this shipment was made the average running time between the same points was ten days, on account of the fire and great increase of freight; and that the apples were carried in about seven days.

Under the facts as stated, the defendant denied that there was any unreasonable delay on its road, and insisted that having completed the carriage of the fruit over its road, and delivered it to the next carrier in good order, in no event could it be held liable for the alleged injury to the property, occurring while in transit, and in the custody of the next carrier.

Was there, then, under the circumstances stated, any unreasonable delay on the part of the company in the carriage of these apples between Vandalia and Chicago?

Railroad companies are bound to have all reasonable and necessary facilities and appliances for conducting and carrying on the business in which they are engaged in a prompt, skillful and careful manner. It is their duty to keep and maintain their tracks in a good condition and state of repair, to have a sufficient supply of rolling stock to carry, and suitable depots to receive, the usual and ordinary quantity of freight offered them for transportation, or which might reasonably and ordinarily be expected. They are not bound, however, to be prepared for unusual and extraordinary contingencies which no ordinary prudence or foresight could reasonably foresee or anticipate. And where an unusual contingency has arisen, which unexpectedly largely increases the business, or prevents, as in this case, the handling of freight in so prompt and expeditious a manner as the company formerly had been accustomed to do, the company can-

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not be charged with unreasonable delay for not carrying freight in the same time it had done previous to such contingency. In other words, what would or would not constitute unreasonable delay, cannot be determined by a comparison between the actual time and what had been the average running time between two given points under usual and ordinary circumstances. The proper question would be, what was the average running time under the extraordinary and unusual circumstances existing at the time of the alleged delay; and then to ascertain whether the goods in question had been unreasonably delayed beyond such time.

It appears in this case that the average running time between Vandalia and Chicago when these apples were shipped was ten days, while the time occupied in carrying and transferring the apples did not exceed seven, thus showing not only that there was really no delay in this case, but that these goods were given a preference and were carried through in an unusually prompt and expeditious manner under all the circumstances.

Look at the result of the doctrine contended for by the plaintiffs if carried out. The usual and average time for carrying freight before the fire between Vandalia and Chicago was two days. Owing to the destruction of the company's tracks and depots, and the large and sudden influx of business, ten days was the average time actually required to carry freight between these same points, and it was impossible for the company to carry it in two days. Should the company, under the facts as presented, be liable for unnecessary delay in each case where more than two days was taken to transport freight between those points? To so hold would be to render the company liable in every instance, and that for a delay caused by circumstances over which it had no control.

The position taken by plaintiffs, defendants in error here, would make it the duty of the company to carry and deliver freight with the same rapidity during the time of these extraordinary occurrences that it did previous there-

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to, and hold it responsible for the delay if it did not. But the company found it impossible, without any fault on its part, so to do. The destruction of the tracks and depots utterly prevented the company from handling freight with its accustomed rapidity, and caused a blockade along the entire line. Circumstances beyond their control prevented, and the law does not seek to hold any one responsible upon the ground of negligence for not doing that which it was practically impossible to do.

It was urged, however, that it was the duty of the company to send forward freight in the same order in which it was received; that there should have been no discrimination made, no preference given between the classes of freight received by the company for transportation. After the fire large quantities of goods were being sent forward by relief societies from all parts of the country for the purpose of both preventing and relieving the great suffering and distress which did exist and otherwise would have existed among the people, who had by a great public calamity suddenly been left without proper clothing or houses to shield and protect them from the inclemencies of the season, or sufficient provisions to prevent many of them from imminent danger of starvation. So urgent was the demand for supplies that relief societies sprung up as if by magic all over the country. The people promptly responded to their calls, and the necessary supplies of all kinds were sent forward in such abundance that railroad companies, crippled as they were by the fire, found it difficult to promptly carry and dispose of their freights. Relief goods, therefore, were given the preference, and the companies would have been justly chargeable with public condemnation had they refused to give a preference to and carry all such goods offered for transportation under the circumstances. Although the company had suffered very great injury by the fire, yet it was doing all in its power to repair the damage as promptly as it could, and at the same time making every effort to carry forward all goods received, making, however, a just, proper,

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and highly commendable discrimination in favor of that class of goods which would alleviate the suffering and distressed. The law is not so harsh and unjust as to punish a common carrier who makes such a discrimination under the circumstances, but rather commends and approves what was done. While, therefore, it may be true as a general proposition, that it was the duty of the company to forward freight in the order in which it was received, yet in this case there was a great public necessity to which all general rules must bend, making it the imperative duty of the company to give relief goods a preference. "The law itself and the administration of it," said Sir W. Scott *(2 Dods., 323-4)*, "must yield to that to which every thing must bend—to necessity. The law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling to impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases. In the performance of that duty, it has three points to which its attention must be directed. In the first place it must see that the nature of the necessity pleaded be such as the law itself would respect, for there may be a necessity which it would not. A necessity created by a man's own act, with a fair previous knowledge of the consequences that would follow, and under circumstances which he had then a power of controlling, is of that nature. *Secondly*, that the party who was so placed used all practicable endeavors to surmount the difficulties which already formed that necessity, and which on fair trial he found insurmountable. I do not mean all the endeavors which the wit of man, as it exists in the acutest understanding, might suggest, but such as may reasonably be expected from a fair degree of discretion and an ordinary knowledge of business. *Thirdly*, that all this shall appear by distinct and unsuspected testimony; for the positive injunctions of the law, if proved to be violated, can give way to nothing but the clearest proof of the necessity that compelled the violation." And it is also said

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to be a general rule admitting of ample practical illustration, "that where the law creates a duty or charge, and the party is unable to perform it without any default in him, and has no remedy over, there the law will in general excuse him."—*Paradine v. Jane, Aleyn, 27, cited per Lawrence, J., in 8 T. R., 267; Evans v. Hutton, 5 Scott, N. R., 670.*

This case comes within the principles quoted. Here was a necessity which the law would respect. It was not created by the company's own act, but by a power which proved to be beyond the control of man. The company used all practicable endeavors to surmount the difficulties which formed that necessity, and all this appeared by distinct and unsuspected testimony. We are all of opinion, therefore, that from the undisputed facts in this case there was not only no unreasonable or unnecessary delay in the transportation of the apples, but that the same were carried within the then average time of carrying freight between Vandalia and Chicago, and that the jury should have been so instructed.

Admitting, however, that there was unreasonable delay between Vandalia and Chicago, would the defendant by reason thereof be liable for the injury which the apples sustained by freezing while in the custody of the next carrier?

In *Clark v. Moore et al., 3 Mich., 62*, it was said: "No damages are ever recoverable in actions *ex contractu*, unless they are shown by the party claiming them to be the natural and proximate consequence of the breach complained of. Of course each of the circumstances which concurred with the breach in producing the damage, and without which it would not have happened, is a part of its cause, and if any of these concurring circumstances are so far out of the ordinary course of nature, or of human affairs, that they cannot be fairly presumed to have contemplated by the parties at the time of making the contract, then the damage is not the natural result of the breach, and is therefore not recoverable." This rule has been since repeatedly followed.

The contract which the defendant entered into in thi

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case was to carry the property safely and deliver it within a reasonable time to the next carrier at Chicago. The only breach of this agreement complained of was the failure to deliver within a reasonable time. Are, then, the damages claimed the natural and proximate consequence of such breach? We think not. To be so the loss must be immediately connected with the supposed cause of it. The loss in this case might or might not have occurred even had there been no delay. If in the ordinary course of events a certain result usually follows from a given cause, then we may well consider the immediate relation of the one to the other to be established. Cold, freezing weather does not, however, in the ordinary course of events, follow from mere delay; such is not the natural and direct result of the delay. It is true that in certain climates, and at certain seasons, such an injury would be much more likely to result from delay, while at others there would be not even a possibility of such a result following. It is very evident, therefore, that as we approach the one or the other we must enter upon debatable ground, where it would be very difficult, if not indeed impossible, to say what the result of a given delay would be. Where fruit is to be carried a long distance, especially in such a country as this, where the climate is so changeable, it would as frequently result that delay would be the cause of averting such an injury as of contributing to it. It may be true that had there been no delay whatever on the part of defendant, the loss would not have happened. The law, however, cannot enter upon an examination of, or inquiry into, all the concurring circumstances which may have assisted in producing the injury, and without which it would not have occurred. To do so would only be to involve the whole matter in utter uncertainty, for when once we leave the direct, and go to seeking after remote causes, we have entered upon an unending sea of uncertainty, and any conclusion which should be reached would depend more upon conjecture than facts.

Lord Bacon said: "It were infinite for the law to con-

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sider the causes of causes, and their impulsions one of another, therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree."—*Bacon's Maxims.*

The following cases are so directly in point, and the reasoning therein so satisfactory, that a reference thereto will render any farther discussion unnecessary.—*Denny v. N. Y. C. R. Co., 13 Gray, 481; Railroad Company v. Reeves, 10 Wall., 176; Morrison v. Davis, 20 Penn. St., 171; Hoadley v. Northern Transportation Co., 115 Mass., 304.*

The court, therefore, should have given defendant's eleventh request to charge.

We think the court also erred in refusing to give defendant's twelfth request. This request was based upon the assumption that the Chicago and Northwestern R. R. Co. was guilty of negligent delay in carrying the apples after delivery to them by the defendant, and the court was requested to charge, in substance, that if the jury should find that without such delay the damage would not have occurred, then the plaintiffs could not recover. It is somewhat difficult to conjecture upon what theory this request was refused. If the jury should find that there was negligent delay on the part of the carrier to whom defendant delivered the apples, and that without such delay the injury would not have occurred, then clearly this defendant should not be held responsible for an injury caused by the negligence of others over whom it had no control. Take the case of fruit, during the summer season, shipped at San Francisco for New York; during the transit it passes over several different lines of railroads; there is a delay of two days on each line, and in consequence of the entire delay, the fruit on reaching the ultimate consignee, is found badly damaged. Is the first carrier to be held responsible for the consequence of the entire delay? Such a rule, to say the least, would savor very much of harshness, and if carried out to its legitimate results would, we think, end in absurdity. Suppose the fruit shipped at San Francisco was consigned to the European

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market, and each different carrier through whose hands it passed delayed it somewhat, and that in consequence of the combined delay, the fruit on arriving at its destination was found injured; or, arriving during a riot, was wantonly destroyed; should the first carrier be held responsible for the entire loss? To so hold, there should be something in the undertaking or agreement into which the company entered, to show that it contracted with reference to such an enlarged liability; in other words, such an injury would not be the natural result of the delay on the part of the first carrier, but the result in part of the combined delay. It would not, therefore, naturally result from the breach on the part of the first carrier, nor could such a result have been contemplated by the parties at the time of entering into their agreement.

As the views we have taken of this case will be decisive upon a new trial, we do not consider it necessary to discuss the other questions raised. The judgment of the court below must be reversed, with costs, and a new trial granted.

The other Justices concurred.

The Michigan Central Railroad Company v. William H. Edwards.

Railroads: Freight: Contracts: Evidence. An action to recover back six dollars per car load for freight paid under protest at the rate of twenty-two dollars per car for lumber transported by a railroad company, based on an alleged contract that, in consideration that plaintiff would build a mill and cause the pine timber on his lands near by to be sawed thereat and furnish the lumber to the company for transportation, the company would carry the same for sixteen dollars per car, will fail in the absence of evidence that such an undertaking binding upon the company was in fact made; and the evidence in this case is held to have come short of proving any such promise on behalf of the company.

Heard October 14. Decided November 2.

Error to Saginaw Circuit.

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Gaylord & Hanchett and *G. V. N. Lothrop*, for plaintiff in error.

John J. Wheeler, for defendant in error.

GRAVES, CH. J:

The defendant in error sued in general assumpsit to recover back what he claimed to be excessive charges paid under protest for transporting lumber. He recovered a verdict, and the company brought error. The objections are presented in a bill of exceptions, which contains all the evidence and the judge's charge. The transaction in controversy arose in connection with the Jackson, Lansing & Saginaw Railroad, operated by the plaintiffs in error, and by them called the Saginaw division of the Michigan Central Railroad. The case can be better understood by adverting to a few circumstances as epitomized in the brief of defendant in error.

In 1872 Edwards owned three hundred and sixty acres of pine land, estimated to contain from ten to twelve million feet of pine timber, situated about forty-three miles northerly from Bay City, on the line of the Jackson, Lansing & Saginaw Railroad.

One George W. Hotchkiss wanted to build and place a mill to cut this timber, but had no money. He proposed to Edwards to build a mill on this land, the latter to supply the money and get his pay with interest through the sawing. The land was then the extreme limit of the railroad; all was a wilderness; no settlements or inhabitants beyond, nor for miles southerly. There was no way to get the logs or lumber to market except by the railroad. It is proper to mention that at this time one Sanborn was interested with Edwards, but not long after his interest was vested in the latter. In view of the arrangement then contemplated with Hotchkiss, or rather in view of the expediency of going into such an arrangement, these persons con-

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versed with Mr. Watson, the division superintendent, and Mr. Northrup, the division freight agent, in regard to rates for freighting lumber, and railroad accommodations for carrying forward the suggested project. Certain letters also passed, of which four were put in evidence. Only three of them are material in this inquiry.* One of April 5, 1872, was addressed by Northrup to Edwards and Sanborn; one by Hotchkiss, of May 2d, to Northrup; and the third, of May 4th, by Northrup, in reply to this last. The theory of Edwards' ground of action is stated by his counsel as follows: The theory of the plaintiff below was, that in consideration that Edwards would build a mill, or furnish the money therefor, and cause the lumber to be sawed thereat,

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*JACKSON, April 5, 1872.

GENTLEMEN:—By request of Mr. Watson, allow me to say, the rate on lumber car loads from a point not exceeding forty-five miles north of Wenona to Wenona will be sixteen dollars. From said point to Saginaw, say sixty miles, twenty dollars.

On through business, or business consigned to points east of Detroit or south of Jackson, the rate will be governed by the Wenona rate, with twelve dollars per car added from point of shipment. For instance, our present rate, Wenona to Detroit is twenty-five dollars, and twelve dollars added would make the rate thirty-seven dollars from point of shipment to Detroit, or forty-two dollars to Toledo, fifty-two dollars to Chicago, seventy-two dollars to Cincinnati, forty-eight dollars to Fort Wayne.

If you conclude to build on the line of the road, we will give you the benefit of the lowest possible rate at all times.

Believing the same will prove satisfactory, I remain,

Yours truly,

M. NORTHRUP,

General Freight Agent.

May 2, 1872.

Mr. Northrup,

DEAR SIR:—I called to-day, and have had a talk (not decisive) with Mr. Watson, in relation to your letter to Edwards & Sanborn.

They wish me to build a mill on their land at twenty-one north, two east. I wanted in their behalf assurance of the time for which the terms you can give them should last. I spoke to him, as he will tell you, for terms on lots leaving the mill, unloading at East Saginaw for being planed, then re-loaded over your road for the east, asking if the twelve dollar rate should hold good on it.

I want to know how much encouragement you will hold out to me in the matter of getting my material on the lot to build

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and furnish it to the railroad company for carriage, the company would carry and deliver it at Wenona for sixteen dollars a car. The mill was built, the lumber furnished, and the carriage entered upon, and for a time performed at the agreed price, and then delivery was refused except on payment of twenty-two dollars a car. To get his lumber, plaintiff paid under protest, and asks that the excess of six dollars a car be paid back to him. This statement by counsel for the defendant in error affords an explanation of the case he claims the evidence tended to establish.

The positions taken by counsel for the plaintiff in error will appear by recurring to their requests to charge. They requested, and the court refused to charge, that there was

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a good mill, taking it either from East Saginaw or Bay City. Will you please write me immediately? If I go into the operation, I shall have a mill of about one hundred and fifty thousand a week, the year round for ten years.

I rely upon your doing the best for me you can to get my machinery and material on the ground for a start. Your answer as to the matters mentioned will influence my decision largely.

Yours truly,
GEO. W. HOTCHKISS,
East Saginaw.

May 4, 1872.

Geo. W. Hotchkiss, Esq., East Saginaw,

DEAR SIR:—Yours of the second is at hand, referring to the same, my note to Edwards & Sanborn of the 5th April. *There will be no increase in the Wenona and Saginaw rates; if any, there will be a reduction on these points.* The through rates are liable to change from Wenona. *The twelve dollar rate would remain the same at all times.* The twelve dollar rate would not apply to shipments to be unloaded, planed, and re-shipped. However, if there is much of this kind of business to be done, I see no objection to making a liberal reduction in the twenty dollar rate to East Saginaw, if transfer is promptly made. Any machinery that you wish to send up for the purpose of building a mill, we will take at lumber rates, say from East Saginaw to mill twenty dollars. From Wenona to mill sixteen dollars. Believing the same will prove satisfactory, I remain,

Yours truly,
M. NORTHRUP.

P. S.—If you conclude to ship the machinery, please advise us, and I will arrange as above.

Yours,—M. N.

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no evidence to authorize a recovery; that the letters, either in conjunction with the oral matter or by themselves, did not constitute a contract; that if the evidence went to show an agreement partly in writing and partly not, and not to be performed within a year, it was not binding; that if it should be found that there was a written proposition to perform services to extend beyond a year, the acceptance, unless in writing, would not be of force to make the proposition obligatory; that the evidence did not show that Northrup had authority from the company to make the contract claimed to have been made; and finally, that no recovery could be had for the money paid as freight, unless it should be found from the evidence that it was wrongfully demanded by the company whilst holding the lumber, and that a delivery of the lumber was refused except upon the payment. And in support of the first request the specific point is now made and strongly pressed, that if the bargain alleged was in fact made, it was repugnant to public policy and void on account of its discriminating operation.

Passing by the question of authority in the company's agent to make the supposed contract, and passing the points respecting the application and operation of the statute of frauds, and the point based on public policy, and waiving, moreover, the facts that defendant in error proceeded to consummate the arrangement with Hotchkiss; that the mill was built pursuant to that arrangement; that, as contemplated, lumber was manufactured and delivered to the company for carriage; that several car loads were actually carried for sixteen dollars per car, and that the company compelled the defendant in error to pay twenty-two dollars per car load for all carried afterwards,—there is still a question remaining which goes to the essence of the case. If it were admitted that the company promised to carry as alleged, the most that could be claimed on the other side, to establish any accession thereto, would be that the defendant in error subsequently acted on it. This would follow, because it is very plain that there was no evidence, either written or

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oral, of any express acceptance. But the evidence, it is true, did show that the arrangement between Edwards and Hotchkiss was entered into; that the mill was built; that lumber was manufactured and furnished to the company for carriage, and that a large quantity was actually carried.

Before these facts, however, can be allowed to operate as an implied or virtual acceptance of a previous promise on the part of the company, there must be evidence tending to show the existence of the supposed promise. For it cannot be held that particular acts were done or based upon a promise unless there was such a promise, and here I think the case fails. The verbal evidence had no tendency to show such a promise by the company. Had the letters any? This depends upon the construction due to them in view of the circumstances. On reading them in the light shed by the surrounding facts, it is not perceived that they had. Edwards and Sanborn of the one part, and Hotchkiss of the other, were talking about embarking in the enterprise we have mentioned. If they went into it they would have, for two or three years at least, large quantities of lumber to be carried away, and they naturally deemed it important to get information in regard to the cost of carriage. Moreover, they were no doubt solicitous to get assurance that if the rates ascertained were answerable to the character of their project they should not go higher.

They proceeded to call on the company agents to find out what rates could be obtained in case the mill should be built and operated. In doing this they were not minded to bind, and did not assume to bind themselves to the company in any way that the suggested agreement with Hotchkiss should be entered into and carried out, or that any lumber should positively be provided to be carried by the company, or that they would not embrace any other means which might offer to do their transporting business. Nothing of this kind was within the scope of their plan. The most that they sought was to find out what rates could be obtained, and if found admissible, then, without binding

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themselves to any thing towards the company, to get as high an assurance as practicable that such rates should not be altered to their disadvantage.

The agent of the company informed them of the then existing rates, and expressed a spirit of accommodation. But when pressed for assurance that the rates should not be made more onerous for the next two or three years, Mr. Northrup did not assume to promise on behalf of the company that no such change should in fact be made. He did, however, express a very decided opinion that no change detrimental to defendant in error would be made. Upon this he was very positive. Still he refrained, as before stated, from any promise that the rates should be immutable. The nature of his assurance stopped short of that. He believed that if any change should happen it would consist in a reduction rather than an advance of rates, and stated his belief very positively, and he observed that if it was concluded to build the mill on the line of the road the lowest possible rates would be applied. The facts indicate that he expected to remain in charge, and to have it in his own power and discretion to regulate such matters as they should occur. And this fact helps to explain somewhat the tone of his letters. He had in his own mind a line of future policy, and which he no doubt expected to pursue; and although not assuming to bind the company by a continuing promise, he was impressed with the idea that by means of his position the respective future shipments by defendant in error would be subject to his policy, and amenable to his expressed opinion as to rates in the future. This, it appears to me, is a fair exposition of Mr. Northrup's doings. In a matter of so much importance as a promise to bind his company for a term of years for the carriage at a fixed rate of many millions of feet of lumber, and without any obligation whatever on the other side, it would have been very singular if he had left the undertaking to be deduced from general and vague expressions in two or three letters. Before making such a stipulation he must, if satisfied he had any power

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to make it, have bestowed some thought upon the bearing it would be likely to have on the interests of the company, and his agreement must have shown some care and deliberation. On the other hand, it is very difficult to suppose that if the minds of the parties had met upon such a one-sided promise as that claimed to have been made by the company,—a promise fraught with so much moment,—Mr. Edwards would have been satisfied with any thing so loose, indefinite and informal as these letters. On the whole, I think there was no evidence tending to prove the promise relied on, and that the court ought to have charged accordingly, as requested.

The judgment should be reversed, with costs, and a new trial ordered.

The other Justices concurred.

Charles T. Parker v. The Northern Central Michigan Railroad Company.

Railroads: Subscriptions: Corporate existence. In an action upon a subscription to a railroad company which recognizes the corporation, the existence of the company cannot be disputed, and questions of the regularity of its organization are immaterial.

Subscriptions to stock: Consideration. Subscriptions to stock are only binding upon the subscribers when they are so made as to bind the company; and as the statute creates no obligation on the corporation, except upon subscriptions regularly made, no others can be enforced unless they were made upon some actual consideration or agreement binding the company.

Subscriptions: Consideration. The subscription sued upon in this case, not having been taken by commissioners as required by the statute, cannot be supported except upon some positive consideration proceeding from the company.

Declaration: Subscriptions: Contracts: Consideration: Cause of action. An averment as to a subscription not within the statute, that defendant being desirous that the company should proceed in the building of its road, etc., in consideration thereof did subscribe and sign such subscription, setting it out, in the absence of any averment that the company

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undertook to build the road in response to the subscription or in reliance on it, or that in building it afterwards they did it in such reliance, or that the company or its agents ever prepared, proposed or sanctioned such subscription, or ever received, accepted or in any way recognized it, fails to allege any consideration for the promise declared upon, and therein falls short of stating a binding contract, or making out a cause of action.

Subscription: Acceptance: Ownership: Possession: Delivery. In an action in the name of the company for the use and benefit of a third person, upon a subscription thus declared upon, where it appeared that the paper was originally got up by a voluntary movement among citizens, and its actual delivery to, or acceptance by the company was not shown, it is error to rule that the production of the instrument at the trial is evidence of its delivery to the plaintiff.

Heard October 19 and 20. Decided November 2.

Error to Calhoun Circuit.

Brown & Patterson and *A. M. Culver*, for plaintiff in error.

Rienzi Loud, for defendant in error.

CAMPBELL, J:

Parker was sued on a subscription for stock of the Northern Central Michigan Railroad Company. The subscription was made December 27, 1869, in the following terms:

"We, the undersigned, in consideration that the Northern Central Michigan Railroad Company shall proceed in the building of said road, hereby agree to pay to said company (for which we shall have paid up stock of the company), the amount set to our names, to be paid twenty per cent. a month, beginning when the work shall have been commenced." The amount was two hundred dollars. The declaration avers that work was commenced August 1, 1871, and afterwards completed; and that in April, 1872, stock was tendered, and that plaintiff below was ready and willing to perform.

Several questions are presented on the record, the most important of which relate to the nature and consideration of this instrument.

Some points are made upon the preliminary steps for the organization of the company, but we do not regard them as

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important on this record. The subscription, if valid otherwise, recognizes the corporation, and its existence cannot be disputed.

The principal inquiry is, whether a valid contract is alleged and proven. To establish this it is necessary to show not only a promise by Parker, but a meeting of minds of both parties and a consideration valid in law to maintain the promise.

Under the railroad law in force when this company was organized, the original stock subscriptions were to be made upon books opened by commissioners, and a subscription made in the manner pointed out by law gave the subscribers such a right to stock as bound the company, and furnished a consideration for the undertaking of the parties signing. But it has been held uniformly that the subscribers were only bound when the company was bound, and that no unilateral subscription could be upheld. And as the statute did not create any obligation on the corporation, unless upon subscriptions regularly made, no others could be enforced unless they were made upon some actual consideration or agreement binding the company.—See *Carlisle v. Saginaw Valley & St. Louis R. R. Co., 27 Mich. R., 315; Shurtz v. Schoolcraft & Three Rivers R. R. Co., 9 Mich. R., 269.*

It appears in the present case that the subscription sued upon was not taken by commissioners. It must, therefore, if valid, rest on some positive consideration proceeding from the company. And the question arises whether this is alleged or proved.

Upon considering the declaration, which was amended after one jury had been sworn and discharged, and on which there has since been another voluntary nonsuit upon a trial before the one now under review, we may assume it represents the case on which plaintiff below was prepared to rely as to what could be established. And we find the declaration and the proof equally defective in the same direction.

The averments in the declaration fail entirely to make

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out any contract, and merely show a subscription or promise not alleged to have been within the statute. It alleges merely that Parker signed his name to this paper; and this, with the consideration alleged, is set forth as follows: "that defendant, being desirous that said company should proceed in the building of its road from Jonesville to Albion in this state, in consideration thereof, by the name and initials of C. T. Parker, did subscribe and sign his name to the following agreement."

This may, perhaps, by a liberal construction, indicate that the building of the road was to be the consideration for the promise, as mentioned in the first part of the subscription. Whether that would suffice or not might depend somewhat on whether the company were already bound to build it. But there is no averment that they undertook to build it in response to the subscription, or in reliance on it, directly or indirectly, or that in building it afterwards they did it in such reliance.

Neither is it averred that this subscription was got up or signed in response to any proposition of the company, nor that the company or its agents ever prepared or sanctioned it. There is no averment directly or inferentially authorizing the conclusion that it was ever delivered to or accepted by, or in any way recognized by the company or any authorized agent, at any time whatever.

We have then no more than the signing of a paper on the one side and the building of a road on the other, but nothing to show that the one was in any way caused by or dependent on the other. There is an averment of a tender of stock, which is not, however, connected with any statement that an undertaking to furnish it formed the consideration of the contract or any part of it, and which tender, whether made or ready to be made, was repudiated on the trial as unnecessary to be shown, and as aside from the actual consideration.

It is very clear that there could be no contract for stock or any thing else unless the company was bound as well as

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Parker. The subscription as alleged is not set forth as an offer, but as a present undertaking, and is declared on as an agreement from its date. But whether complete or to be made complete by subsequent acceptance, one or the other must be alleged and must be proved. The objection was pressed on the trial very strenuously that the promise was voluntary, but no amendment was made to obviate it.

Upon inspecting the proofs they indicate very plainly the same defect. There is not any evidence of a single resolution or other act of the company, or its board, authorizing the subscription or accepting it as a contract by which they were to be bound. And there is no legal evidence that we have discovered that it was ever delivered to the company or acted upon. Its history seems to be this, as far as it can be inferred.

The subscriptions were got up by a volunteer movement among citizens, stimulated by persons interested and who in some instances may have been officers, but who did not act as agents, or in an official capacity.

William H. Brockway was the only important witness for the company, and no attempt was made on his direct examination to trace the subscriptions into the possession of the company, or to show any corporate recognition of them. He was cross-examined, and although he gives some impressions that the papers at some time or other came into the hands of the board or some of the officers, there is nothing which amounts to proof that the board ever received or accepted them. He seems in June, 1871, to have obtained an assignment of all the floating assets of the company and claims this subscription among the rest. This is all that appears.

The plaintiff did not claim to have shown any actual delivery or acceptance, but relied upon the presumption arising from its possession at the trial. The court, upon this question, charged the jury as follows: "I advise you further, that the subscription book, being produced here by the plaintiff, is evidence that it was delivered to the plaintiff, and

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conclusive in the absence of evidence that it was wrongfully obtained by the plaintiff."

As the suit appeared to have been brought by Brockway, the plaintiff's name being used for his benefit, the incorrectness of such a ruling in regard to such a paper is manifest. The necessity of proving the mutuality of the agreement made it necessary to show distinctly when and how the company was bound, and possession by the corporation itself long after suit commenced would have been of no avail to raise a presumption of seasonable liability. And when it was shown the paper was originally got up and held by strangers, it became necessary to account for it and trace it.

As both declaration and proof are fatally defective on the very existence of an agreement, it would be improper to discuss the important and complicated questions which would arise if its complete execution had been made out.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

Reuben E. Bird v. John L. Perkins.

Trover: Village taxes: Regularity of incorporation: Collateral inquiry. In an action of trover to recover the value of property taken and sold for village taxes, questions of the regularity of the incorporation of the village will not be considered; a private party may not in this collateral way question an assumption of corporate powers which the state does not dispute.

Evidence: Official character: Village marshal. In such an action evidence that defendant was appointed marshal by a resolution which recites the resignation of his predecessor, and that he proceeded to the discharge of his duties without his right being questioned, so far as appears, is a sufficient *prima facie* showing of his official character as village marshal.

Taxes: Village board: Illegalities: Notice. The defendant is not to be held chargeable, by reason of his having been a member of the village board when the tax was levied, with notice of illegalities.

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BIRD v. PERKINS.

Tax-roll: Valuation: Figures: Dollar-mark. It is not a valid objection to a tax-roll that the figures indicating the valuation of property on the roll are not preceded by a dollar-mark; and especially not where the tax is properly carried out with the dollar-mark preceding it.

Tax-roll: Certificate: Copy: Presumptions. The tax-roll and the assessor's certificate are distinct things; and it will not be presumed that because the copy of the roll upon which the tax is extended has no certificate copied upon it, the original roll was not properly authenticated.

Tax-roll: Description of land. The description of land on a village tax-roll as the east half of the southeast quarter of a section, omitting to give the number of the section, is not so defective as to be void when the village contains but one east half of a southeast quarter of a section.

Tax-roll: Warrant: Extension: New warrant. The fact that a new warrant was issued after the original had been extended, and before the period of the extension had expired, where both were attached to the tax-roll in defendant's hands, could not detract from the protective force of the process, since if either warrant was valid it was sufficient for defendant's protection.

Tax collector: Process fair on its face. A tax collector is protected by process that is fair on its face against any illegalities except his own.

Tax collector: Detaining horse levied upon: Keeping: Expenses: Excess. A tax collector does not become a trespasser *ab initio* by keeping a horse he has levied upon a little longer than is absolutely necessary to giving notice and making sale; and if the keeping be lawful, the expense is a lawful charge, but if not, the owner in a proper action may recover the excess.

Heard October 20. Decided November 2.

Error to Lenawee Circuit.

This is an action of trover to recover the value of a horse, the property of the plaintiff, which was taken and sold by the defendant as marshal of the village of Clayton, to collect money due on a tax levied by the village board on plaintiff's land. The cause was tried by jury, and verdict and judgment having passed for defendant, the plaintiff brought error.

Howell & Watts and *C. A. Stacy*, for plaintiff in error.

A. L. Millard, for defendant in error.

COOLEY, J:

1. We do not consider the objections which were made to the evidence introduced for the purpose of showing a regular incorporation of the village, because we do not regard

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that question as involved in this suit. Proceedings had been taken under which a village government had been brought into existence and was exercising its authority. If defects exist, they should be pointed out in a direct proceeding for the purpose, instituted on behalf of the state. Even the state, it has been held, may be precluded from raising such objections after the corporate government has been fairly established with general acquiescence (*People v. Maynard, 15 Mich., 463*); but a private party cannot be allowed in this collateral way to question an assumption of corporate powers which the state does not dispute.—See *Fractional School District v. Joint Board of Inspectors, 27 Mich., 3.*

2. Sufficient evidence was given of the official character of defendant as village marshal. True the resignation of the person chosen marshal is not shown, but the resolution appointing defendant to that office recites a resignation, and a person of the same name, and presumptively the same person as the one who was elected, signs defendant's official bond. These facts, we think, make out a *prima facie* right in defendant, especially as he proceeded to the discharge of the duties without, so far as we are informed, his right being questioned.

3. The principal question in the case concerns the protection which the defendant claims under his warrant. Plaintiff insists that he is not protected, *first*, because, having been a member of the village board when the tax was levied, he is chargeable with notice of all illegalities. But on this point this court, in *Wall v. Trumbull, 16 Mich., 228*, held the contrary. *Second*, because the warrant was not fair on its face, but, on the contrary, that and the roll attached to it had several defects which rendered it invalid.

Of the defects which the plaintiff has pointed out we shall notice those which seem to us to require it. One of these is, that the figures indicating the valuation of property on the roll were preceded by no dollar mark, and therefore the roll does not on its face show whether money or something

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else was intended. But an inspection of the roll shows clearly enough that dollars were meant, and no one could possibly have been in doubt on that subject. The tax is properly carried out with the dollar mark preceding it; and this would perhaps be enough in any case; but the decisions in *Cahoon v. Coe, 52 N. H., 518, 524,* and *State v. Eureka etc. Co., 8 Nev., 15,* which to us are satisfactory, would sustain the roll without it.

Another objection is, that the certificate attached by the assessor to the roll was insufficient. The original roll is not in evidence, and we do not know what certificate was to that. We do not understand that the copy of the roll upon which the tax is extended must have the assessor's certificate copied upon it. The roll and the certificate are distinct things.—*Tweed v. Metcalf, 4 Mich., 579.* Defendant therefore had a right to assume that the original roll was properly authenticated.

It is also objected that one description of land for which plaintiff was charged was so imperfectly described as to be void. The description was the east half of the southeast quarter of a section, but without giving the number of the section. But on examination of the petition upon which the village was organized we find the village contains but one east half of southeast quarter of a section, and consequently this description is sufficient.

A further objection is, that the board issued a new warrant to defendant after having extended the original warrant and while the period of the extension was still unexpired. But if the original warrant was still in force the new warrant was merely nugatory. Both the new and the old warrant were attached to the roll in defendant's hands, and if either was valid it was sufficient for his protection.

These objections not being well taken, we think defendant had process which was fair on its face. We also think this was sufficient to protect him against any illegalities except his own.—*Ford v. Clough, 8 Greenl., 334; Nowell v. Tripp, 61 Me., 426; Savacool v. Boughton, 5 Wend.,*

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171; Chegaray v. Jenkins, 5 N. Y., 376; Turner v. Franklin, 29 Mo., 285; Walden v. Dudley, 49 Mo., 419; Holden v. Eaton, 8 Pick., 436; Underwood v. Robinson, 106 Mass., 296; Brainard v. Head, 15 La. An., 489; Blanchard v. Goss, 2 N. H., 491; Kelley v. Noyes, 43 N. H., 209; Moore v. Allegheny City, 18 Penn. St., 55; Billings v. Russell, 23 Penn. St., 189; Shaw v. Dennis, 5 Gilm., 405; Hill v. Figley, 25 Ill., 156; State v. Jervey, 4 Strob., 304; Loomis v. Spencer, 1 Ohio, N. S., 153; Watson v. Watson, 9 Conn., 140; Neth v. Crofut, 30 Conn., 580; McLean v. Cook, 23 Wis., 364; Noland v. Busby, 28 Ind., 154; LeRoy v. East Saginaw City Railway Company, 18 Mich., 233; Lott v. Hubbard, 44 Ala., 593; State v. Lutz, 65 N. C., 503; Gore v. Mastin, 66 N. C., 371; Erskine v. Hohnbach, 14 Wall., 613.

4. We do not think the defendant became a trespasser *ab initio* by keeping the horse levied upon a little longer than was absolutely necessary to giving notice and making sale. There may have been good reasons for this, and something must be allowed to the officer's discretion in such cases. And if the keeping was lawful, the expense was a lawful charge; but if not, the plaintiff in a proper action might recover the excess.

There is no error in the record, and the judgment must be affirmed, with costs.

The other Justices concurred.

James G. Wright v. Samuel V. Irwin.

Promissory notes. The following instrument is held to be a promissory note, viz.: "For value received I promise to pay to the Northern Central Michigan Railroad Company or bearer the sum of fifteen hundred dollars, to be paid twenty per cent. a month from the first day of July, 1871,

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towards the right of way and grading said railroad from Jonesville to the city of Lansing."

Promissory notes: Evidence: Consideration: Bona fide holder. The exclusion of evidence that the promissory note sued upon was obtained without consideration and by false inducements and fraudulent representations is not error where the plaintiff is presumptively a *bona fide* holder, and before any evidence has been introduced to impeach his position as such.

Evidence. The exclusion of an irrelevant instrument between third parties is not error.

Promissory notes: Consideration: Misrepresentations. It having been made to appear that plaintiff was not a *bona fide* holder of the note sued upon, it was error to exclude evidence tendered to show that the only inducement for the giving of the note was the statement to the maker by the director of the road to whom it was given, that the road would run through a named street and across his land, and that the depot would be located there, which statement was in point of fact not true.

Heard October 20. Decided November 2.

Error to Calhoun Circuit.

A. M. Culver and *Brown & Patterson,* for plaintiff in error.

Rienzi Loud, for defendant in error.

GRAVES, CH. J:

Irwin brought general assumpsit, and his ground of action was an instrument of the following tenor, dated Albion, June 19, 1871: "For value received I promise to pay to the Northern Central Michigan Railroad Company or bearer the sum of fifteen hundred dollars, to be paid twenty per cent. a month from the first day of July, 1871, towards the right of way and grading said railroad from Jonesville to the city of Lansing. J. G. Wright."

The general issue was pleaded, with notice of special matter, but no affidavit questioning the genuineness of the instrument was made.

The cause was tried by jury and a verdict returned for Irwin. A bill of exceptions was settled at Wright's instance, and he brought error. At the trial Irwin produced the instrument declared on, and offered it in evidence, and the

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court admitted it against several objections. The only ground of objection which appears worthy of notice was, that the instrument was not a promissory note, and we are satisfied this was not tenable.

That Wright executed and delivered the paper to the company was fully admitted by his failure to show any thing by affidavit to the contrary,—*Burson v. Huntington, 21 Mich., 415; Polhemus v. Savings Bank, 27 Mich., 44,* and other cases; and the authorities are full to show that the writing is a promissory note.—*Edwards on Bills, ch. 3.* It contains all the elements required, and the statement at the end, about right of way and grading, does not take away its legal quality as a promissory note.

Wright, for an expressly admitted consideration, promised to pay the company or bearer a certain sum of money in definite instalments at specified times, and he promised nothing else. He admits he delivered it to the company. There is no contingency, no alternative, no uncertainty. The passage superadded goes to explain how the party absolutely entitled to receive the money was expected to employ it; that is all, and it served in no manner to impair the right to exact the money promised at the times set for payment, as so much money payable by the provisions of a promissory note.—*Beardslee v. Horton, 3 Mich., 560; Knight v. Jones, 21 Mich., 161; Littlefield v. Hodge, 6 Mich., 326; Fairchild v. Ogdensburgh, Clayton & Rome R. R. Co., 15 N. Y., 337; Hodges v. Shuler, 22 N. Y., 114; Bull v. Sims, 23 N. Y., 570; Oatman v. Taylor, 29 N. Y., 649, 665; Cota v. Buck, 7 Met., 588; Wells v. Brigham, 6 Cush., 6; Taylor v. Curry, 109 Mass., 36; Protection Insurance Co. v. Bill, 31 Conn., 534; Holland v. Hatch., 15 Ohio St., 464.*

The case of *Cook v. Satterlee, 6 Cow., 108,* which was most relied on to support the objection, is not at all analogous. There W. F. and C. E. Clark drew a bill upon the Satterlees, and thereby requested them to pay four hundred dollars and take up a note for the amount which had been given

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by William and Henry B. Cook. By acceptance the Satterlees promised to do what was requested by the drawers, and the court considered that the undertaking amounted to a promise to pay four hundred dollars on the giving up of the note, and so was conditional; and, hence, as the court said, the instrument was not "technically" a bill of exchange.

Whether this view was right or wrong, it has no bearing here.

There was no force in the objection to the question put to Stetson, when asked whether the note shown to him was that on a copy of which he had computed the interest.

When the plaintiff below rested, the defendant proceeded to offer evidence for the purpose of showing, as he claimed, that the note was obtained without consideration and by false inducements and fraudulent representations made by one then acting on behalf of the company, and who treated for the note, and in fact received it when made.

On objection by counsel for the plaintiff below this evidence was excluded. These rulings were certainly correct when they were made. Without stopping to consider whether the proof tendered, or any part of it, would have been objectionable or not if the defendant had been in a situation at the time to advance the proposed defense as we understand it against Irwin, it is enough for the present purpose that he was not then in such a situation.

Irwin was presumptively a *bona fide* holder, and no evidence had then appeared to impeach his position as such and open the way to the defense. At a subsequent stage of the trial, and after these rulings, it was admitted for the purpose of the trial that Irwin took the note after it had fully matured from W. H. Brockway, who was then, and also at the time of the trial, a director of the company; that at the time of taking it Irwin was also a director and the president of the company, and that the note was an item of the assets retained by Brockway pursuant to a written instrument purporting to have been made by the company and Brockway under date of the 19th of August, 1871, or

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two months subsequent to the date of the note, and at which time Brockway was acting as one of the board of directors; that this instrument provided, amongst other things, that Brockway, in consideration of the covenants and agreements to be kept and performed by him, should have as his own property all the notes and subscriptions then in any wise belonging to the company. Thereupon the plaintiff in error offered in evidence an instrument in writing, purporting to have been executed between the company of the one part, by Mr. Brockway as their agent, and J. Condit Smith of the other part. This instrument bore date on the 8th day of June, 1871, or eleven days prior to the execution and delivery of the note by Wright to the company. The admission of the paper was objected to, and the court excluded it. No explanation was given as to what was aimed at by its introduction, and as its relevancy was not apparent, the ruling was not irregular.

Wright's counsel then offered evidence that the only inducement for his giving the note was Mr. Brockway's statement that the road would run through Center street in Albion, and across Wright's land, and that the depot would be located there, and that Wright could have sub-contracts for construction. This was rejected. The offer was not very precise and clear, but I am inclined to think it ought not to have been refused. The respective positions of Irwin and Brockway, their relations to the company, and their relations to each other through the company, had been shown. These and the other facts belonging to the case should be considered in connection with the proposal in question, and thus looking at the matter, the offer may be construed as importing a tender of evidence to show that the consideration of the note consisted in benefits Wright might naturally expect, and did expect, from the final location of the road through Center street and across his land, and the location of the depot there; that Brockway being in a situation to know, and Wright not, the former assured Wright that the road and depot would be there, and hence gave

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Wright to understand that the sites of the road and depot were finally fixed and settled, and that Wright confided in Brockway's assurance, and was thereby caused to believe, and did believe, that it was settled and determined that the road would go through Center street and across his land, and that the depot would be there placed.

Now if Wright was brought to give the note by such inducements, and Mr. Brockway was either aware that the road and depot would not be so placed, or had no good reason for believing that they would be, and in point of fact they were fixed elsewhere, it appears to me that it should be left to the jury to find that the note was obtained by fraudulent misrepresentations.—*Beebe v. Knapp, 28 Mich., 53; Bristol v. Braidwood, Ib., 191; Shaeffer v. Sleade, 7 Blackf., 178; Sawyer v. Prickett and wife, 19 Wall., 146.*

Contemplating the offer in this way, the gist of the representation proposed to be shown would not be matter of opinion, or promissory in character, but of the existence of a fact or circumstance sure to produce consequences which Wright was willing to assume, and did actually assume would be valuable to him. But the offer may be viewed in another aspect. The evidence proposed had, with other facts admitted to the jury, some tendency to show that the company, through Mr. Brockway, their agent, obtained the note on the consideration and agreement that the road and depot were already definitely located so as to cross his land and make the depot there, and as the fact was not so, and the road and depot were made elsewhere, the note was without consideration.

On the whole, it seems to me the evidence offered should have been submitted to the jury under proper instructions calling for their interpretation and application of it.

The judgment is reversed, with costs, and a new trial ordered.

The other Justices concurred.

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Wendell A. Mace and another v. Alverson W. Page.

Declaration: Common counts. The common counts in assumpsit are not adapted to the recovery upon a promise to pay a given sum of money in consideration of the plaintiff's deeding to defendants certain land to be by them turned over to a third person for land the latter was to convey to a railroad company for depot grounds.

Joint defendants: Evidence: Individual undertaking. In an action upon such a promise against two jointly, where the evidence wholly fails to show any such promise or undertaking as to one of the defendants, or to connect him in any way with the contract declared upon as a joint undertaking, the plaintiff cannot prevail.

Heard October 21. Decided November 2.

Error to Lenawee Circuit.

A. L. Millard, for plaintiffs in error.

Walker & Weaver, for defendant in error.

GRAVES, CH. J:

An action of assumpsit was commenced by William D. Page against the plaintiffs in error, and he dying, his death was suggested and his son and administrator was allowed to carry on the case.

When the Chicago & Canada Southern Railroad was being located through the village of Morenci, in Lenawee county, many of the village people felt an interest and were active in regard to the site to be fixed for the road, and also in regard to the situation of a projected depot. It would seem that there was some competition among the people on the subject, and that the plaintiffs in error acted as a committee to aid in bringing about a particular location of the road and depot, and solicited funds to further the general object. They seem to have carried on various negotiations, but the record does not afford much light as to their course of proceeding. This suit originated in one of these transactions.

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The declaration sets up in different special counts, and with variations more or less important, certain express joint promises of the plaintiffs in error to William D. Page to pay him given sums of money in consideration of his deeding to them certain land to be by them turned over to one Packer for land he was to convey to the railroad company for a depot.

The general counts were also added. The general issue being pleaded, the cause was tried before a jury and a verdict found for defendant in error for two hundred and forty-one dollars and seventy-eight cents. The case was subsequently removed here and is now before us on writ of error and bill of exceptions. Some questions are raised in regard to the admission of evidence, and others upon rulings in charging and refusing to charge. An examination of the record, which contains all the evidence, enables us to dispose of the cause very briefly, and without touching several of the points discussed at the bar. In deciding we shall only refer to two features of the record.

First. The evidence had no tendency to prove the plaintiffs in error liable under the general counts. On the contrary, the theory of the plaintiff below as to his ground of action, as appears by the record, was repugnant to a claim under those counts. If by any possibility the proof could be referred to any of them it must be to the count for money had and received. But there is no evidence that the plaintiffs in error jointly received any money for the use of William D. Page, or held any which in equity and conscience belonged to him.

Second. The evidence did not conduce to show, whatever may have been the fact as to Baker, that Mace promised Page or agreed with him to pay him any thing in case he would deed the lands in question to Baker and Mace for the benefit of Packer. Wherever evidence is drawn out to show some agreement of this kind by Baker, it fails wholly to implicate Mace. At the interview in the road, to which Alverson Page testified, Mace was not present, and the evidence

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of Mowry, about drawing the contract, and as to what it contained and what was then said, does not tend to prove any promise or agreement on the part of Mace to pay Page five hundred dollars, or any sum, out of a fund, or in any way. In short, the evidence wholly failed to connect Mace with any promise or agreement to pay Page. There was accordingly no evidence of a joint undertaking; the plaintiffs in error were entitled to the instruction they asked in their twelfth request,* and the refusal of it was improper.

The judgment should be reversed, with costs, and a new trial ordered.

The other Justices concurred.

John Friedland and others v. George McNeil.

Building contracts: Superintendent: Contractor: Implied promise. The nature of the duties of a building superintendent are such that it would be improper that he should be appointed or controlled by the contractor; and the two positions being inconsistent, a contract will not be implied for the employment of the contractor as superintendent of his own work.

Evidence: Presumptions. It will not be presumed there was error in admitting evidence of the value of the contractor's services as superintendent in his action against his employers, where the record does not show that he may not have been employed as superintendent over the work of others upon the building, his contract being for the mason work only. All reasonable intendments are to be made in support of the rulings brought up for review.

Building contracts: Damages: Delay: Agreed remedy. Whether a provision in a building contract authorizing the employers, after notice to the contractor, to take the work into their own hands and complete it at the contractor's expense if he failed to proceed with due diligence, is not to be regarded when acted upon as a remedy agreed upon as a substitute for future damages:—*Quære?*

*12. The plaintiff cannot recover unless he has shown a contract made by both defendants. Any agreement of one them, even if made in the name of both, would not bind the other without evidence that he also agreed to it. And the mere fact of their having this fund in their hands jointly, and being engaged together in the common object, would not authorize one to bind the other by a contract to pay money.

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FRIEDLAND v. MCNEIL.

Building contract: Church: Mason work: Delay: Loss of pew rents. Delay in the completion of a contract to do only the mason work of a church, will not authorize the recovery of the loss of pew rents as damages, at least not in the absence of special averments; such loss cannot be said to be the necessary, natural or probable result of the delay, since the completion of the contract does not put the building in condition for the renting of pews.

Evidence: Contract: Damages: Eight per cent. mortgage. Where a contractor was to receive as part payment an eight per cent. mortgage running six years, an offer to show in defense to his action, that by reason of his failure to complete the contract in season the employers were compelled to borrow money at a higher rate to complete it themselves, is not sufficiently specific, in the absence of any proposal to show that the current rates for six year loans were higher than eight per cent., to warrant its reception as a basis for estimating damages.

Employers: Taking charge of work: Delay: Damages: Eight per cent. mortgage. It seems that the employers, by taking the work into their own hands under the proviso of the contract authorizing them so to do in case of unreasonable delay, thereby waived all claim to damages for being deprived of any benefits accruing to them from the stipulation regarding the mortgage.

Building contracts: Defaults: Damages: Cost of completion: Evidence. Where the employers under a building contract have, by virtue of a proviso in their contract, taken the work into their own hands, and completed it at the expense of the contractor, they are entitled to show in defense to the contractor's action, what the completion of the work cost them, provided they paid only the current rates; and the error committed in excluding evidence of the actual cost at current rates will not be cured by admitting afterwards the opinions of experts as to the probable cost.

Heard October 21 and 22. Decided November 2.

Error to Superior Court of Detroit.

This was an action brought by McNeil against the rector and trustees of St. Joseph's Church of Detroit upon a written contract for doing all the mason work, and furnishing the materials therefor, upon a church building, to recover a balance of the contract price, and for extra work. McNeil recovered judgment and the defendants brought error.

Maybury & Conely, John Atkinson and *Alfred Russell,* for plaintiffs in error, cited: *Clark v. Moore, 3 Mich., 55; Burrill v. Salt Co., 14 Mich., 34; Platt v. Brand, 26 Mich., 173.*

Alfred E. Hawes, J. Logan Chipman and *C. I. Walker,* for defendant in error, cited: *Clark v. Moore, 3 Mich., 60;*

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Sedgwick on Damages, 66-7, 79-85; 2 Greenleaf Ev., 261; Allen v. McKibbin, 5 Mich., 453.

COOLEY, J:

It is not very clear from this record that the court erred in admitting evidence of the value of McNeil's services as superintendent. Undoubtedly it was the duty of the parties who employed him to furnish and pay the superintendent. This is not only the custom in such cases, but the nature of the duties to be performed by a superintendent are such that it would be highly improper that he should be appointed or controlled by the contractor. He is to oversee the work of the contractor, and to exercise a *quasi* judicial authority in determining upon its suitableness and sufficiency under the contract; and this fact would seem to preclude all idea that he was to superintend for his employers his own work. The two positions of contractor and superintendent of the contractor's work are inconsistent, and it is no less than an absurdity to imply a contract on the part of the employers to pay him for accepting on their behalf his own work. Nor is it very manifest that, if the superintendency went no farther, the contractor would be put to any extra trouble. As contractor he must see that his own work is sufficient, and as superintendent he could do no more. If, therefore, the builders left him to act as superintendent, while there might be a strong inference that they expected to confide in his judgment, discretion and fairness as to the character of the work and materials, it would be on a very violent presumption if it were to be assumed that they expected to pay him for superintending himself.

But it does not distinctly appear from the record that McNeil was not to superintend the work of others. His contract was for mason work only, and it does not affirmatively appear that he superintended nothing else. All reasonable intendments are to support the rulings below; if it were legally possible for the employers to make their con-

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tractor superintendent, we must infer that the proper showing was made. There was certainly no difficulty in the way of his being made the superintendent of the work of others, and therefore no error in admitting evidence tending to show an employment. Whether the evidence went far enough to make out a case is another question, and one upon which nothing in this record enables us to pass.

Complaint is made that the church trustees were not allowed to show a loss of pew rents in consequence of the contract not being completed in season. It may be questionable whether the provision in the contract, authorizing them after three days' notice to take the work into their own hands and complete it at the contractor's expense if he failed to proceed with due diligence, is not to be regarded when acted upon as a remedy agreed upon as a substitute for future damages (*Clark v. Babcock, 23 Mich., 164*); and if not, whether the extension of the time for completion by consent or acquiescence was not a waiver. The question is not very material here, because a further difficulty is insuperable. The contract upon which suit was brought was not one the completion of which was to put the building in condition for the renting of pews. A large amount of other work would still remain to be done, and large expenditures to be made, with which this contractor would have no concern whatever; and the building might never be put in condition for the renting of pews and yet he be in no way responsible. It can never be said that the loss of rents is a necessary, natural or probable result of a particular default, when had no default occurred, the necessary conditions to rent would still be wanting, and might never be supplied. Any claim against this contractor for damages resulting from loss of rents must assume that the trustees had the ability and inclination to proceed at once to complete the church, and were only delayed by the contractor's default; but damages so remote and contingent would require to be specially claimed by the pleadings, if recover-

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able at all, which is doubtful.—See *Michigan Central R. R. Co. v. Burrows, supra, p. 6.*

The offer to show damages by reason of the trustees being deprived of the privilege of giving to McNeil a fifteen thousand dollar, six year, eight per cent. mortgage for part of his demand, was not sufficiently specific to warrant the proffered evidence, if no other objection existed. The offer was to show that by reason of McNeil's failure to complete the contract in season, they were compelled to borrow money at a higher rate to complete it themselves. It was not proposed to show that the current rates for six year loans were higher than eight per cent., nor that the loans made by the trustees were any thing more than mere temporary loans. If by reason of McNeil's default they lose the benefit of an eight per cent. credit for six years, it does not follow that they suffer damages therefrom, unless the current rates of interest are such that money cannot be borrowed on that time without paying more. This the defendants did not offer to show. A temporary loan can afford no proper standard of comparison for a loan of six years.

But it may be questionable whether all rights under the stipulation regarding the mortgage were not gone when the trustees took the work into their own hands. Where the contractor completes the work, there is no difficulty in enforcing such a stipulation, since if he refuses the mortgage, he is precluded from recovering the compensation until the credit to be given by the mortgage has expired. But when the employers take the work into their own hands, the stipulation becomes incapable of specific enforcement, because they then do the work at his expense, and are likely to be his creditors instead of his debtors. Nothing then remains but the question of damages; and these would be damages not for a refusal to take a mortgage as agreed, but for neglect to complete the work so as to have earned the mortgage. The loss of the opportunity to give a mortgage would

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consequently be only one of the elements which go to make up damages from a failure to perform the work in season. There are serious difficulties in the way of holding that damages can legally be predicated of the loss of an opportunity to give a mortgage at a rate of interest exceeding that fixed by law, and which, as a legal presumption, must usually be deemed adequate compensation for the use of money; difficulties so troublesome that when suggested by a contract any alternative which the contract presents may well be supposed to have been provided as a substitute.

Now this contract provides in substance that when the contractor completes the work he shall take a mortgage for fifteen thousand dollars in part payment. It also provides that if he does not complete it, the trustees may do so at his cost. Is it a legitimate inference from these stipulations that it was contemplated by the parties that a failure on the part of the contractor to complete the work should subject him to damages for not putting himself in position to be required to receive the mortgage in part payment? This does not appear to us so simple a question as it was assumed to be by counsel for the trustees.

There can be no legal presumption that it is to one's advantage to give a mortgage at eight per centum interest. On the contrary, when a stipulation for such a mortgage appears in a contract, the presumption is reasonable, where nothing appears in the contract to qualify it, that it was for the benefit of the party who was to receive the mortgage, rather than of the one who was to give it. And this presumption would be stronger in proportion to the time the mortgage was to run; because in the money market, if the security is ample, the rates are usually diminished as the time is increased. It could not, therefore, be held as a presumption either of law or fact that the trustees would be damnified by losing the opportunity to give such a mortgage to the contractor, or that they would lose any thing by taking the work into their own hands at the contractor's expense. The giving of the mortgage might prove to be for his benefit

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rather than for theirs; this would depend upon contingencies not to be fully foreseen when the contract was made; and these contingencies would strengthen the probabilities favoring a construction of the contract that if the trustees took the work out of the contractor's hands this stipulation would be waived. We are inclined to regard this as the legal construction.

The fourth exception taken by the plaintiffs in error we have not been able to overcome. They offered to show what the finishing of the work cost them after they took it into their hands, and that they paid the current rates. This offer was excluded. It is true they were permitted afterwards to put in the testimony of experts on the same point, but this did not cure the error. If the excluded evidence were cumulative merely, it should have been received; but it was really something more; it was or should have been more satisfactory and conclusive upon the question of cost than any mere opinions. No opinions can be so satisfactory or conclusive as the actual test, if fairly and honestly carried out. It is true, as was urged on the argument, that the cost to defendants was not the proper test of what they were to charge the contractor; but they offered to show that they paid only the current rates, and this offer made the evidence admissible. We regret the necessity for sending the case back for a new trial, but there seems to be no alternative. It will be so ordered.

The other Justices concurred.

Benjamin Frankenberg v. The First National Bank of Decatur.

Bill of exceptions: Stenographer's minutes. The practice of certifying up the stenographer's minutes of the whole trial bodily as a bill of exceptions is severely criticised.

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FRANKENBERG v. FIRST NATIONAL BANK OF DECATUR.

Special questions to the jury. Special questions submitted to be propounded to the jury which are wholly inconclusive should be excluded.

Check: Over-draft: Evidence: Payment: Notice: Finding of facts. In an action by a bank to recover the amount of a check drawn upon it by the defendant, and paid by the bank though defendant had no funds on deposit, the claim put forward by defendant that the check grew out of an intended horse trade which was not consummated, and that the bank was notified not to pay it, is fully met and disposed of by the finding of the jury that the check was to be paid even if the horse trade fell through, and that the payment was made before notice not to pay was received.

Submitted on briefs October 22. Decided November 2.

Error to Van Buren Circuit.

Edward Bacon, for plaintiff in error.

Newton Foster, for defendant in error.

MARSTON, J:

If the object of counsel in this case in not preparing a proper bill of exceptions was to mystify and hide the questions intended to be raised, if any, we must say he has succeeded admirably. What purports to be a bill of exceptions is nothing but a verbatim copy of the stenographer's minutes taken on the trial. We have question and answer throughout, objections on both sides, and exceptions taken, conversations of counsel and court, a great deal of which can have no possible bearing in the case. And this mass of immaterial matter, this bushel of chaff, we are expected to search through to see if we cannot find a single grain of wheat stowed away somewhere. We have in this case a printed bill of exceptions covering thirty-five pages, whereas, if properly prepared by counsel, five pages would have been ample to have enabled them to raise all the material questions presented in the case, and that too in a manner that would have enabled us to pass upon the same. If the stenographer's minutes are to be certified up as the bill of exceptions, it is very evident that in cases which may have occupied one or more weeks in the circuit, we will have

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records ponderous in size, at least, but almost wholly valueless for any other purpose. We do not wish to be understood as saying that it may not be necessary to sometimes incorporate in the bill of exceptions the entire testimony which it is claimed tends to establish a material fact, and upon which a request was given or refused, but such instances are rare, and we trust we will not again be under the painful necessity of referring to such matters.

There were also in this case twenty questions submitted to the jury upon which they were requested to find specially. Most of these questions seem to be wholly inconclusive, and the circuit judge should not have permitted them to have been submitted to the jury.—*Crane v. Reeder, 25 Mich., 303; Sheahan v. Barry, 27 Mich., 217.*

This seems to have been an action brought by the bank to recover the amount of a check drawn by Frankenberg in favor of Chadwick upon the bank and paid by it, although Frankenberg had no funds in the bank at the time the check was drawn and paid. It seems to have been contended on the trial that the check grew out of an intended horse trade which was not consummated, and that Frankenberg notified the bank not to pay the check. The jury, however, found specially that the check was to be paid even if there had been no horse trade, and that the cashier of the bank, before the check was paid, had not received any notice not to pay it. Under such circumstances the bank was entitled to recover. And taking into consideration the manner in which this case is presented, we do not feel justified in seeking any further for supposed errors.

The judgment must be affirmed, with costs.

The other Justices concurred.

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Richard Elliott v. Emma Van Buren.

Assault and battery: Attempt to ravish: Quality of evidence: Reasonable doubt. In an action for an assault and battery an averment in one count of an attempt to ravish does not change the nature of the action, nor affect the quality or weight of evidence required to make out a case; and a ruling that should preclude a verdict upon such a charge unless the jury were convinced beyond a reasonable doubt would be error; such a rule of evidence is not applicable to civil controversies.

Amount of verdict: Weight of evidence: Questions for jury. A court of review will not consider the amount of the verdict, or the weight of the evidence. The jury will be presumed to have done no legal wrong so long as they acted within their province, and their verdict will not be disturbed, unless the court has committed legal error.

Damages: Assault: Aggravation of existing disease. The aggravation of an existing disease or injury by an assault is as reasonable a ground of complaint, and as proper an element to be considered in estimating damages, as the creation of a new one.

Evidence: Sickness: Suffering: Complaints: Declarations. The declarations of a sick person made from time to time concerning present sufferings and sensations are admissible to prove the fact of such sufferings and sensations.

Witnesses: Bodily ailments: Physicians: Best evidence. Unskilled witnesses are not precluded from testifying to facts that came within their own observation relating to ordinary injuries or sickness of those with whom they have consorted, not involving medical knowledge beyond that of ordinary unprofessional persons, by any rule of evidence requiring such facts to be proved by physicians only, for the reason that theirs is the best evidence.

Credibility of witnesses: Question for jury. All considerations concerning the credit due to the witnesses respectively are for the jury only.

Evidence: Ostensible purposes. The exclusion of the evidence of the defendant's wife, offered to prove that she knew and approved of the professed purpose for which defendant left his own house to go to that of the plaintiff on the occasion when the grievance complained of is alleged to have occurred, is held not error under the circumstances of this case, there having been no evidence given before to which this would have been responsive, or which it would have tended to disprove.—GRAVES, CH. J., dissenting.

Assault and battery: Attempt to ravish: Damages: Felonious design. The gist of the action being the assault and battery simply, and the matters of aggravation affecting only the amount of damages, any shortcomings in the proof of the felonious design would not preclude a verdict for such damage as was made out to the satisfaction of the jury.

Immaterial evidence: Charge to the jury. Where immaterial evidence has been received without objection, instructions to the jury are not open to complaint on the ground that they precluded the jury from giving proper weight to such evidence, for it is not entitled to be given any weight.

Evidence: Plaintiff's bad character: Credibility: Damages. Allowing evidence of plaintiff's bad character to go to the jury in such an action, as bearing upon her credibility as well as upon the question of her consent

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to defendant's acts, and also upon the damages, is giving it as wide a scope as the defendant is entitled to ask for it.

Exemplary damages: Intentional assault. An intentional assault, whether serious or trivial, must be regarded as willful, and would authorize such damages as in the sound judgment of the jury the character and extent of its atrocity would require; and where the evidence tends to show an indecent, if not a felonious assault, the case is a fit one for exemplary damages.

Exemplary damages. The question of the propriety of exemplary damages in cases of willful wrong is no longer an open one in this state.

Charge to the jury. Instructions to the jury which are not liable to mislead them as to their powers or duties, will not be reviewed in reference to their spirit or style, as bearing with severity against the party complaining of them.

Heard October 22. Decided November 2.

Error to Ingham Circuit.

Dart & Shields and *D. Johnson*, for plaintiff in error, on the point that the testimony of physicians is to be regarded as the best evidence of bodily ailments, cited: *Rex v. Quinch, 4 C. & P., 571; Evans v. People, 12 Mich., 27; Johnson v. McKee, 27 Mich., 471; 1 Greenleaf Ev., § 82;* and as to the admission of declarations and complaints of sickness and suffering: *Page v. N. Y. Central R. R. Co., 6 Duer, 523; Baker v. Griffin, 10 Bosw., 140; Enos v. Tuttle, 3 Conn., 250; Caldwell v. Murphy, 11 N. Y., 416; 1 Greenleaf Ev., §§ 110, 111;* as to the evidence of plaintiff's bad character: *People v. Abbott, 19 Wend., 192; Beebe v. Knapp, 28 Mich., 67; Rex v. Barker, 3 C. & P., 589; Hadden v. Shortridge, 27 Mich., 213;* and on the subject of exemplary damages: *Austin v. Wilson, 4 Cush., 273; Sinclair v. Tarbox, 2 N. H., 135; Taylor v. Carpenter, 2 W. & M., 22; Tabor v. Hustin, 5 Ind., 322; Nossman v. Ricket, 18 Ind., 350; Cook v. Ellis, 6 Hill, 466; Wilson v. Middleton, 2 Cal., 54.*

H. B. Carpenter and *M. V. Montgomery*, for defendant in error, on the subject of exemplary damages, cited: *Day v. Woodworth, 13 How., 368; Allison v. Chandler, 11 Mich., 542; Warren v. Cole, 15 Mich., 265; Detroit*

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Post v. McArthur, 16 Mich., 447; Kreiter v. Nichols, 28 Mich., 496; Elliott v. Herz, 29 Mich., 202; Welch v. Ware, 32 Mich., 77.

CAMPBELL, J:

Emma Van Buren sued Richard Elliott for an assault and battery, one count of the declaration averring an attempt to ravish. The chief bodily damage shown on the trial consisted of bruises and injuries creating bodily weakness, and the aggravation of a malady accompanied with fits. The jury rendered a verdict of five thousand dollars. Errors are alleged upon various rulings during the trial, and in the charge to the jury.

The course of the argument renders it proper to refer briefly to some preliminary considerations.

This action is nothing more than trespass for an assault and battery. There is no such thing as a private action for a crime as such. The civil grievance here charged was an assault, described, as was proper, with its attendant circumstances of enormity, including an attempt to ravish. This, however, does not make it differ from an action for a lighter grievance, except as showing a heavier ground of complaint, for which, if made out, the damages allowed would be likely to be larger. The assault could be shown under either count, and if the whole circumstances of enormity were not made out, this would not defeat the action, but would only bear on the amount recovered. There is no rule of evidence which requires a greater preponderance of proof to authorize a verdict in one civil action than in another, by reason of the peculiar questions involved.—*Watkins v. Wallace, 19 Mich. R., 57.* The doctrine of this case has been adhered to in this state, and the court rightly refused to direct the jury that they could find no verdict upon the main charge, unless on proof of the nature and degree required on an indictment for an attempt to commit the crime of rape; that is to say, in other words, they must be convinced beyond

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a reasonable doubt. Indeed, if such a direction would have been proper at all, it would have been applicable to the whole case; for a common assault has always been indictable, and an attempt to commit a felony was only a misdemeanor at common law, and the rule of reasonable doubt is not confined to felonies. No doubt a jury will always feel disposed to scrutinize an infamous charge more closely than a trifling one, and will not convict without being well satisfied, but there is no rule of law which adopts any sliding scale of belief in civil controversies.

We are also compelled to remark that it is not in the province of an appellate court to consider the amount of the verdict, or the weight of the evidence. The court of trial may set aside a verdict which violates justice, and it is to that tribunal that parties must apply for relief against excessive damages, or any other of the wrongs for which it may be right to grant a new trial. We are bound in all cases to assume that the jury have done no legal wrong when acting within their province. If the court below has committed no legal error, we can only affirm the judgment.

The errors assigned, though numerous, are all capable of arrangement under a few heads.

The first group comprises objections to the reception of testimony tending to prove the continued results of the assault, in bodily weakness and malady, and the fact of plaintiff's suffering from fits. The errors are supposed to consist in receiving irrelevant testimony, and in receiving testimony which was not in law the best quality of evidence.

Upon the first of these points the case is covered entirely by the decision in *Johnson v. McKee, 27 Mich. R., 471.* The sickness and other physical mischief caused by the assault constitutes of necessity a large part, and sometimes the worst part of the damage done. The aggravation of an existing disease or injury is quite as reasonable a ground of complaint as the creation of a new one. And the declarations of a sick person made from time to time concerning present sufferings and sensations (not being relations of past

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occurrences) are the usual means of evidence where third persons testify on the subject. The opinion in that case covers the whole ground, and we need not enlarge upon it further.

It is claimed, however, that the testimony of persons who are not physicians should be excluded, on the ground that the law requires the best evidence, and theirs is not the best.

The term "best evidence" is confined to cases where the law has divided testimony into primary and secondary. And there are no degrees of evidence except where some document or other instrument exists, the contents of which should be proved by an original rather than by other testimony, which is open to danger of inaccuracy. But where living witnesses are placed on the stand, one is in law on the same footing with another. If he can testify at all, he can testify in the presence as well as in the absence of those who may be supposed wiser or more reliable. There are some questions on which some witnesses cannot testify at all for want of knowledge. No one can be allowed to prove what he has never learned, whether it be ordinary or scientific facts. But one who can testify under any circumstances upon the facts on which he is examined, may do so as well where his superiors are to be found as where he knows as much as any other.

We think there is no rule which can prevent ordinary witnesses from describing what they see, or from testifying concerning the kind of injury or sickness of others whom they have had occasion to consort with, unless it is something out of the common course of general information and experience, or unless the question presented involves medical knowledge beyond that of ordinary unprofessional persons. It would be ridiculous to shut out testimony of what any juryman would understand well enough for all the exigencies of the case before him, simply because no physician has seen or examined the party. It would lead to a denial of justice in all cases of bodily injuries and sickness which did not occur within range of medical help, and which were not

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regarded as so difficult of treatment as to demand it. There is no danger that the introduction of common testimony on matters of common knowledge will do any more mischief, when open to cross-examination before a court and jury, than would arise from the want of any legal means of selecting witnesses from the numerous class of professional men, who differ as much in their relative merits as many of them do from laymen. There is nothing in the record before us which shows that any question arose on which it was necessary to resort to the evidence of learned witnesses. And all considerations concerning the credit due to the several witnesses belonged to the jury.

It is also alleged as error, although not much pressed on the argument, that the defendant's wife was not allowed to testify as to her knowledge and approval of the purpose with which defendant below left his own house to go to that of Mrs. Van Buren on the occasion under review. But it must be manifest that if he actually made the assault complained of, he could not have done so with any innocent intention, whether he had in view the felonious purpose charged or not. The court charged the jury plainly that he could not be convicted unless he began the attack himself. He might have committed it on an intent conceived at the time, or on one which was of longer duration. A considerable period elapsed before any thing occurred of which complaint is made. The only possible object for introducing the testimony proposed must have been to contradict and discredit the principal witness, or to corroborate defendant, by showing that the defendant professed beforehand that he had an innocent errand. But no previous declaration or intent could change the facts if he was guilty, or could tend to show that he was not guilty. He had been sworn at length and did not profess that his wife suggested his going to plaintiff's house, which was the special matter proposed to be shown; and on this point she could not, if she had so stated, have corroborated him. The only proof of malice brought against him was in the actual circum-

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stances of the assault; and we can see no way in which the effect of these could be changed by his statements as to what had preceded them or by his previous purposes as professed. It would be quite easy for him to get up a false pretext or contrive a plausible errand to conceal his true purpose. And it would be very dangerous to allow a party to make testimony for himself in this way. There was no evidence to which this would have been responsive, and it did not tend to disprove any fact which had been sworn to. How far an inquiry might have been allowed into his doings at this time, if there had been testimony against him covering the same period, we are not called on to consider. There was nothing given tending in that direction, and we cannot discover the pertinence of the inquiry which was shut out.

The suggestion that the charge of the court would have allowed the jury to convict defendant even if acting in self defense is unfounded. The charge is very explicit to the contrary.

Neither can it be alleged as error that some of the charges left the jury to find a verdict, although they might not think Elliot had a felonious design. As stated in the outset, the offense charged was assault and battery, and all the matters in aggravation bore only on the amount of damages. A failure to prove them or any part of them would not have precluded the jury from giving a proper measure of damages for all that was made out.

It is also claimed that the court precluded the jury from allowing proper weight to certain testimony of bad character, both general and specific. So far as any of this testimony was immaterial,—and much of it is admitted to have been so,—we do not conceive that the court was bound to allow it any effect whatever. If the parties allowed it to be received from any views of policy, they ran the risk of its having some effect with the jury. But neither party could have any right to have the jury instructed to regard immaterial evidence for any purpose. When the court told the jury

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this testimony as to character and conduct might be considered upon the question of consent as well as upon the damages, it covered the whole issue, for consent would have entirely negatived the assault. And allowing the specific and improper testimony to be considered as bearing on the credibility of the complaining witness, gave it, in such a case as this, just as wide a scope, inasmuch as the whole case depended on her credibility. Certainly no harm was done to the defendant below by such rulings.

The remaining questions, so far as they can be considered on the record, relate to damages. Some criticisms based on the omissions of the court to repeat in each of its rulings all the supposed elements necessary to authorize exemplary damages will be found without importance, from the nature of the action. There was no dispute but that plaintiff below received some blow or blows, or, what was equivalent, was pushed with more or less force by defendant. If this was done by him as the first assailant, he was unquestionably guilty of an assault. And as an assault cannot very well be purely accidental, and is not pretended to have been any thing but intentional if committed at all, it was such an act as must be regarded as willful, whether serious or trivial. Being so, it authorized the jury to give such damages as would, in their sound judgment, be required by the character and extent of its atrocity. If the jury believed that there was any assault at all, they could not help believing it was an indecent one, if not felonious, because there was no proof of any other.

We need not, therefore, consider any thing except the instructions given concerning what are called exemplary damages, as the case was fit for them if they are allowed at all.

The question of the propriety of their allowance is not an open one in this state. The argument that a person is thereby punished twice within the constitutional and common-law rules is, in our opinion, entirely fallacious. The maxim at common law, that no one shall be twice vexed for

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the same cause, where it applied at all, prevented a second prosecution as well as a second punishment, and if it applied to civil damages would cover the whole, and not merely what is assumed to be a part of them. But there is no analogy between the civil and criminal remedies. The punishment by criminal prosecution is to redress the grievance of the public, while the civil remedy is for private redress. In the eye of the law, the injury where both actions lie, is a double injury, and one action has never, therefore, been allowed to be pleaded in abatement or bar of the other, simply because they are contentions between different parties.

But when we look at the rules which have been provided for enforcing the redress of either the public or the private complainant, we are not so much concerned with any supposable theories on which such rules may be based, as with the rules themselves. Civil actions never lie except for the vindication of broken laws, any more than criminal. It is a matter of arbitrary regulation, and not of principle, whether a given violation of law shall be redressed by a civil or criminal prosecution, or by both; and where new crimes are created out of what were before civil wrongs, the civil remedy has seldom been lessened or narrowed by reason of the new criminal prosecution. Whether we call the process punitory, or exemplary, or remedial, we get no nearer a conclusion, if the law has given the rule of procedure. And the controversy which has been so ably conducted on this head has not tended in any degree to change the legal result derived from the measure of damages in particular cases.

We have had occasion recently, in the case of *Welch v. Ware, 32 Mich., 77*, as well as in previous cases there referred to, to consider the questions at issue here. The jury in all these cases have a very wide discretion. The court can only help them by calling their attention to the elements which may properly be considered, and the dangers to be avoided. On examining the present charges and

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refusals, so far as they are excepted to, we find no material deviation from the rules and suggestions which have been repeatedly laid down on the subject, and therefore no error. It was hardly claimed on the argument that there had been any serious perversion of legal rules, if exemplary damages are recoverable at all.

But complaint is made of the spirit of the charge, as bearing with severity against the defendant.

We do not find that any thing was said which could in any way mislead the jury as to their powers or duties. This being so, we cannot be justified in acting as censors of the style or spirit of the charge, even if we should not approve them ourselves. Judges are not expected to be so purely mechanical in their action as never to express in words more or less of their ideas upon many questions of legal policy and theory, as well as human conduct. The reports are full of judicial remarks which are not supposed to be meant as legal rulings, and which an appellate court would never think of reviewing. In *Sheahan v. Barry, 27 Mich. R., 217*, the remarks complained of bore much more severely against the defendant than any thing which appears in this record. But on a review of the authorities we were there satisfied no ground of error existed, and so we think of the case before us.

The judgment must be affirmed, with costs.

MARSTON and COOLEY, JJ., concurred.

GRAVES, CH. J:

I concur with my brother Campbell except as to the exclusion of one item of evidence, which, as it seems to me, was in itself pertinent and applicable to one aspect of the main defense, and suited likewise to bear upon the assessment of damages. Its credit and force were exclusively for the jury. With those considerations we have nothing to do. Our duty is simply and barely to ascertain whether it was

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competent and required to be submitted to the jury for their judgment. A brief explanation is all that is needed. *First*, It was competent for plaintiff in error to satisfy the jury, if he could, that his being at Mrs. Van Buren's house, on the occasion in question, was not precontrived, but casual, and that she took advantage of his so being there to improvise, contrive or pretend a state of things to give color or appearance of probability to this charge against him, which she resolved to make and thereafter made contrary to the truth. *Second*, Suppose it admitted that he was guilty of some act whilst there amounting to trespass against her person; it would still be competent for him to so explain the affair, if he could, by evidence to the jury as to relieve his conduct more or less of the degree of wrongfulness which would otherwise seem to characterize it. Now, whatever wrongful act, if any, was committed, the jury were entitled to have laid before them every circumstance susceptible of proof by legal means which might tend to fix the character of the act or lighten or deepen its enormity. Such evidence would go in aggravation or in mitigation. If any wrong in contemplation of law was done, its preconception and the contrivance of an occasion would naturally bring the jury to consider it in a light more atrocious, more grievous, and hence in a light calling for larger damages, than if it appeared to have been spontaneous or caused by a sudden giving way, though wrongly, to unexpected temptation and opportunity. Whether the act, then, was sedately and deliberately predetermined, or was a sudden act perpetrated without forethought, was a material question for the jury. The principle suggested is allowed in the criminal law to decide whether an act of willful killing amounts to murder or an offense of lower grade, and it appears to me that it well applies to a personal trespass of the kind complained of here, in so far as to allow the jury to consider evidence upon the point, with a view to the amount of damages. I think, therefore, the court should have allowed the offer to show, by the wife of plaintiff in error, that he went on her prompting and

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request to Mrs. Van Buren's house on the occasion in question. It would, as it seems to me, have borne on the case in the two aspects of it which have been mentioned.

Lyman G. Mason v. George N. Reynolds.

Practice: Overruling demurrer: Judgment: Assessment: Reference to clerk: Notice. On overruling a demurrer to a declaration in assumpsit upon promissory notes it is not regular to give final judgment at once for a given sum in damages, but if the case be not a proper one for pleading over, the correct practice is to award judgment interlocutory with a reference to the clerk to assess the damages under the statute upon notice.

Practice: Assessment of damages: Notice. Defendants after appearance are entitled to be heard upon the assessment of damages, and to have notice thereof.

Submitted on briefs October 22. Decided November 2.

Error to Kent Circuit.

Smith, Nims & Erwin, for plaintiff in error.

J. Mason Reynolds and *J. Martin Harris,* for defendant in error.

PER CURIAM:

This was assumpsit by defendant in error, against plaintiff in error and others, upon several promissory notes. The plaintiff in error appeared and demurred to the declaration, and defendant in error joined. Subsequently the court overruled the demurrer, and without any notice of assessment of damages, proceeded immediately to assess damages and enter final judgment. Conceding for the present purpose, but not deciding, that the case was not a proper one for allowing the plaintiff in error to plead over *(Tefft v. McNoah, 9 Mich., 201),* the court could go no further, on overruling

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the demurrer, than to award judgment interlocutory. It was not regular to give final judgment in the first instance for a given sum in damages.—*1 Burrill's Prac., 250; 2 Tidd, 798.*

The course was, if the case was not proper for pleading over, to adjudge that the demurrer be overruled, and that the plaintiff below ought to recover his damages, leaving the amount to be subsequently ascertained, and ordering it to be referred to the clerk to "examine, ascertain and report what sum the plaintiff ought to recover for his damages."—§§ *6060, 6061, 6062, C. L.* And no assessment could be regularly made without notice.—§ *6063, C. L.*

The defendants below were entitled to be heard upon the assessment, after having appeared.—*1 Burrill's Prac., 373, 374.*

The judgment and assessment must be reversed, with costs, and the cause remanded for further proceedings.

The other Justices concurred.

The Mayor, etc., of Niles v. Franklin Muzzy.

Mayor: Attorney: Employment by city: Services. Where one who is mayor and councilman has, without collusion or fraud, been employed as an attorney to appear for the city and defend a suit brought against it, there is nothing in his official relations to the city to preclude his recovering the value of the services actually rendered under such employment.

Submitted on briefs October 22. Decided November 2.

Error to Berrien Circuit.

Edward Bacon, for plaintiffs in error.

W. J. Gilbert, for defendant in error.

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MAYOR, ETC., OF NILES v. MUZZY.

PER CURIAM:

Muzzy being an attorney and counselor at law and in chancery, and having been elected mayor of Niles, and in virtue of which office he was one of the common council, he was employed under a resolution of the common council to appear and defend the city in a suit in chancery brought against it by one Young in the Federal court at Detroit. In pursuance of such employment he appeared for the city in his professional character and rendered services which the court found to be worth one hundred dollars. The court below gave judgment in his favor for that sum with interest. Having rendered these valuable professional services, it is now objected that he ought not to be paid for them because he was mayor and councilman. There is no question open in regard to their worth to the city, or as to the necessity there was for them. Every such consideration is closed by the finding. Neither his duty as mayor, or as councilman, or as both, included any such service. He was no more required, in consequence of his official position, to employ his time and talents as a counselor at law in conducting a suit brought against the city, than he was to pay the debts of the city out of his own private funds. There may have been, and probably was, substantial reason for thinking his services in the case would be particularly useful to the city, and if such was the case, we see no cause for saying that the city was obliged to forego his professional assistance unless he would give it for nothing. When a case shall be presented showing fraudulent or collusive conduct on the part of one so situated, or between one so situated and other municipal officials, there will be room for different considerations. The finding fairly excludes the existence of any thing of that kind here, and shows that his specific services were sought by the city and given by him; that they were meritorious and actually worth to the city when rendered the sum mentioned.

The judgment must be affirmed, with costs.

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Nelson G. Isbell v. Frank P. Kenyon.

Chancery sales: Foreclosures: Holding open sale: Notice. Where a defendant in a foreclosure suit has bid off the lands at the sale and asked for time to produce the money, and two days' time is given him and the sale is held open for the purpose and public announcement thereof made at the time, but he fails to make good his bid, and the sale is thereupon, at the time to which it was held open, proceeded with and the premises struck off and deeded to another, such latter sale will not be set aside at the instance of such defendant as matter of strict right and in the absence of any showing of equities, for the reason that it was made after the time when by the published notice the sale was advertised to take place.

Submitted on briefs October 26. Decided November 2.

Appeal in Chancery from Saginaw Circuit.

This was a foreclosure bill; and the appeal is from an order denying a motion to set aside the sale under the decree.

S. L. Kilbourne, for complainant.

W. A. Clark, for defendant, cited: *2 Barb., Ch. Pr., 527–539; Hoff. on Mast. in Ch., 418, 420; Leuts v. Craig, 13 How. Pr., 72; Van Busseam v. Maloney, 2 Metc. (Ky.), 550; Howlett v. Davis, 3 Ed. Ch., 338; Baring v. Moore, 5 Paige, 48; Jackson v. Warren, 32 Ill., 331; Miller v. Collyer, 36 Barb., 250; Jackson v. Edwards, 7 Paige, 387; Brown v. Frost, 10 Paige, 41; Clarkson v. Read, 15 Grat., 288; 4 M. & C., 515; 1 Sug. on Vend., 60; 2 Dan. Ch. Pr., 1280.*

COOLEY, J:

The only question in this case is whether the sale was invalid because of its being made after the time when it was advertised to take place. The defendant plants himself upon strict legal rights, and making no showing or claim of equities, insists that when the land is struck off to him, and

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then time is given him to produce the money in, he may, if he shall please, decline to give it any further attention, and the proceedings are at an end, so that no sale can take place without a new advertisement of the time and place.

We have looked into the cases cited for the defendant and find none of them supporting such a doctrine. Nor is it a reasonable doctrine. The sale has been regularly advertised; the land is offered to bidders in pursuance of the notice, and is struck off to the defendant. He insisting upon a day in which to make the payment, the claim is conceded, and the sale is held open till the second day for the purpose. But the proceedings are not suffered to go down; on the contrary they are held open, and for no other conceivable purpose but to enable the commissioner to put up the lands a second time if the bid is not paid. Notifying the persons who were brought together by the published notice, that the sale would be thus held open, was all that would be requisite; and this would enable every one of them to appear and bid if he saw fit, and thus would accomplish all the purpose of the original notice. There can, therefore, be no presumption that the defendant or any one else has lost any thing by the course adopted. In strict law the practice was justifiable; and as already said, strict law is all the defendant has demanded in his motion to set aside the sale. The order denying the application must therefore be affirmed, with costs.

What we have said would have no bearing upon a case where the defendant comes with a showing of equities, or that the land was sold at a price grossly inadequate.

The other Justices concurred.

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Charles A. Lorman and others v. The Phœnix Insurance Company.

Foreign corporations: Agents: Garnishee proceedings: Disclosure. The general agent in this state of a foreign corporation doing business here, who is authorized to receive service of process on its behalf, has authority under the statute, when he has been served with garnishee process against the company, to make answer or disclosure on behalf of the company.

Garnishee proceedings: Disclosure: Foreign corporations: Agent. A foreign corporation against which garnishee process has been served upon its lawfully authorized agent is not to be considered in default for want of an answer after disclosure filed by such agent.

Garnishee proceedings: Disclosure: Plaintiff's evidence. The disclosure in garnishee proceedings is to be considered as evidence for the plaintiff, and unless it affirmatively discloses a liability to the principal defendant the plaintiff cannot recover.

Special appeal: Reversal: Costs. On judgment of reversal in the circuit on a special appeal from a justice's judgment against a garnishee, the latter is entitled to costs.

Taxation of costs: Writ of error. Questions in reference to the taxation of costs in the court below are not brought up for review by the writ of error.

Submitted on briefs October 26. Decided November 2.

Error to Wayne Circuit.

J. G. Dickinson, for plaintiffs in error.

Moore & Griffin, for defendant in error.

MARSTON, J:

The defendant in error, a foreign corporation, was summoned to appear and answer in justice's court as garnishee of Gilbert Travers, under *sections 6463 and 6439 of the Compiled Laws.*

The summons was issued February 3, returnable on the 13th, and was personally served upon Ira Worcester, the general agent of the company in this state, authorized to receive service of process. On the return day the cause was by consent adjourned until the 17th of February, when

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the parties again appeared, and a written answer or disclosure, made and sworn to by Levi T. Griffin as agent and attorney of the company, was filed. This was excepted to by the plaintiff as insufficient, and the cause was again adjourned by consent until March 6th, and on that day it was again adjourned by consent to March 16th, to enable defendant to make further answer. On the 16th, defendant did not appear, and its default was noted, but on the 17th a further answer was filed by the defendant, which was made and sworn to by Ira Worcester, the agent of the company on whom the process was served. The cause was then by consent adjourned until March 19th, at which time counsel for the respective parties appeared, and argued and submitted the cause. March 23d the justice, considering the "disclosures of the garnishee insufficient," rendered judgment against the company for the amount of the plaintiff's claim. The company removed the case to the circuit court by general and special appeal, where the judgment of the justice was reversed, with costs against plaintiff in error Lorman.

We think the justice erred in considering the answer of the garnishee, as made and sworn to by Mr. Worcester, insufficient, and thereupon rendering judgment as though no answer had been put in. Whatever might have been the position of the company until the time the second disclosure was filed, yet after the filing of that disclosure the company could no longer be considered as in default. It is only when the company fails to answer through its proper officer, that the corporation can be held to be indebted to the defendant on the original suit. The statute is clear and explicit, that "the summons may be served upon the general or special agent of the corporation, and it shall be the duty of such officer so sued (served), or of the proper officer of such corporation having knowledge of the facts, to appear before the justice at the return day of the summons," to answer, etc. Worcester was the officer of the company upon whom the summons was served, and it therefore became his duty to appear and answer. Such

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answer could not be treated as not having been made by the proper officer of the company, and therefore a nullity. If he was the proper officer on whom process could be served, he was also the proper officer under the statute to answer. The plaintiffs under this statute could not treat him as authorized to act for the company in the one case, and deny his authority in the other.

This answer having been put in, the company was no longer in default. The proceedings thereafter must be "in the same manner and with the like effect as against individuals." Unless the answer, therefore, disclosed a liability on the part of the company to the principal defendant, the justice had no authority to render judgment against the company. This the answer did not do. It went farther and denied any liability. True, it appears that Mr. Worcester did not have personal knowledge of all the facts stated by him in his disclosure. In the very nature of things this could not well be otherwise in the case of a foreign corporation. This, however, does not help the plaintiffs. The answer is the evidence on their part, and unless it affirmatively, by competent evidence, discloses a liability by the corporation to the principal defendant, they cannot recover.

The judgment of the justice's court having been reversed in the circuit, the garnishee defendant was entitled to its costs, and no question is raised by the assignments of error as to the form of the judgment in this respect. The questions sought to be raised on the taxation of costs cannot be brought up by writ of error in this manner.

The judgment of the court below must be affirmed, with costs.

The other Justices concurred.

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Philip L. Wixson v. Clark Haywood.

Contracts: Subscriptions for stock: Parties: Agreement to furnish stock: Special contract: Money had and received. Wixson, with others, subscribed an agreement circulated by Haywood, whereby such subscribers undertook and agreed with John Sinclair & Co. to take the shares subscribed by them respectively in a petroleum company which the contract stated was being formed by said Sinclair & Co. to develop a part of the Clark farm on Pithole creek and a branch of the same, Wixson subscribing for one share and paying therefor to Haywood one hundred dollars; this contract was signed only by the subscribers for stock, and no signature was appended on the part of Sinclair & Co. Haywood signed and delivered to Wixson a receipt for the one hundred dollars, which recited that the latter is "entitled to certificate of one share of stock," etc., "in accordance with the terms of the subscription to which said Wixson's name is attached."

Held, 1. That Haywood was not liable to Wixson under a special count upon a contract to furnish and deliver to Wixson, in consideration of said subscription and of the payment of the one hundred dollars, the stock called for by the subscription, in the absence of any showing that Haywood was a member of the firm of Sinclair & Co., or that any company had in fact been organized by said firm as contemplated by said subscription paper; that the paper signed by Haywood does not promise that a company shall be formed, nor does it make Haywood a party to the undertaking on behalf of Sinclair & Co. in the subscription paper to form one.

Held, 2. That the receipt by Haywood of the money paid by Wixson on such subscription, under the circumstances, does not make him liable to Wixson under the general count for money had and received.

Heard October 26. Decided November 2.

Error to Sanilac Circuit.

Divine & Wixson and *G. V. N. Lothrop*, for plaintiff in error.

Atkinson Bros. and *John Atkinson*, for defendant in error.

GRAVES, CH. J:

Wixson sued Haywood in assumpsit and claimed to recover either upon a special count or the general count for money had and received. The case was tried without a jury, and on special findings the court gave judgment for the defend-

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ant. The general question is presented, whether upon the facts the plaintiff showed himself entitled to recover. *First*, as to the special count; that proceeds upon the theory that in consideration of one hundred dollars subscribed by Wixson to a paper looking to the subsequent creation of a joint stock company for an oil-well enterprise, and the payment of that sum to Haywood, the latter promised Wixson to furnish and deliver to him the stock called for by the subscription, and that Haywood failed in his undertaking. This agreement of Haywood is claimed to rest upon two documents bearing date November 27, 1865. The first is an agreement with "Sinclair & Co.," by "Perry & Knight," "Philip L. Wixson and Levi L. Wixson," and "Philip L. Wixson," respectively, to take the shares subscribed by them in a petroleum company, which it was stated was being formed by "John Sinclair & Co." "to develop" a part of the Clark farm on Pithole Creek and a branch of the same. The plaintiff became a subscriber to this document for one share, and paid therefor one hundred dollars. The money was in fact paid to Haywood. No signatures were appended on the part of "Sinclair & Co.," and the instrument was only signed by the before mentioned subscribers for stock.

The second paper was signed by Haywood, and was in these terms: "Pithole Creek, Granite State Petroleum Company; capital seventy-five thousand dollars; shares one hundred dollars each. Manchester, N. H., November 27, 1865. Value received of Philip L. Wixson, of Lexington, Mich., is hereby entitled to certificate of one share of stock in the Pithole Creek, Granite State Petroleum Company, in accordance with the terms of the subscription to which said Philip L. Wixson's name is attached."

Sinclair resided in New Hampshire and the defendant in this state. No company seems to have been formed, and the enterprise appears to have dropped after these preliminary movements. The judge found expressly that it did not appear who composed the firm of Sinclair & Co., but he did not find that the defendant was a member. In proceeding

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to construe these papers in order to ascertain the defendant's relation to the transaction, there is much room for contending that the documents on their face imply that he was acting as agent for Sinclair & Co., and not on his own behalf. But passing this, we observe that he does not appear to have been a member of the firm of Sinclair & Co., or a subscriber to the first paper, or a party to it in any way, unless his connection with the second document made him a party; and we do not see how by any rule for construing instruments by their terms it can be held that his connection with the last paper made him a party to the first.

When we come to the paper Haywood signed we cannot find in it any agreement or promise that the company in question should be formed. Viewed in connection with the other, it imports that both parties expected that a company would be created, and were contemplating the right Wixson would then have in consequence of his present subscription and payment, and the most that can be said is, that Haywood stipulated that on the establishment of the company by Sinclair & Co., Wixson would stand entitled to the stock he had subscribed for; and hence until it appears that the company has come into existence, no claim founded upon the stipulation can be made against Haywood. I think, therefore, the plaintiff was not entitled to recover on the special count.

Was he entitled under the count for money had and received? We think not. The money was paid by Wixson to satisfy his subscription upon the paper which Sinclair & Co. tendered to him as a subscription list, and the defendant is not shown to have had any interest in that money. It is true it was in fact paid to defendant, but not to his use. As before stated, it was paid upon the subscription circulated by Sinclair & Co., and of which company the defendant was not shown to be a member, and it was so paid to the eventual use of the joint stock company Sinclair & Co. were to bring into existence, and it was manifestly meant for the hands of Sinclair & Co. in the first

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instance. There is nothing to show that it did not go into their hands long before this suit was commenced, and before any claim against Haywood. The plaintiff had the right, as against defendant, as the case now appears, to contend that the money should be paid to Sinclair & Co. Indeed, it would seem that Haywood actually received it as money to go to Sinclair & Co., whoever composed that firm. It does not appear, therefore, that Haywood has any money in his hands which in equity and justice belongs to Wixson.

The judgment should be affirmed, with costs.

The other Justices concurred.

Bartholomew Murphy and another v. Theodore L. Campau.

Detroit city tax-lease: Term: Time. The term of a Detroit city tax-lease should begin from the time when redemption expired, and not from the date of the tax-sale.

Ejectment: Joint defendants: Several occupation: Evidence: Charge to the jury. In an action of ejectment against two defendants it is error to direct a verdict for plaintiff where the testimony tends to show that there was no joint occupation, or fails so clearly to show joint occupation that the jury would not be warranted in finding that each held what he occupied to the exclusion of the other.

Submitted on briefs October 26. Decided November 2.

Error to Wayne Circuit.

This was ejectment brought by Campau against plaintiffs in error. He claimed title under a Detroit city tax lease dated June 16, 1874, and running two years from that date. The tax sale was made June 16, 1873, upon a bid of two years, under a provision of the charter that tax sales shall be made at public auction for the lowest term of years at which any person shall offer to take the same in considera-

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tion of advancing the delinquent tax or assessment, and providing for redemption at any time within a year after the sale. It was urged that the term should begin from the date of the sale, and that the lease, in providing for a different term, was unauthorized and void. The circuit judge, however, ruled otherwise, and directed a verdict for the plaintiff. The defendants bring error.

George H. Prentis, for plaintiffs in error.

Romeyn & Weir, for defendant in error.

COOLEY, J:

The circuit judge was right in the view he took of the tax lease. The term should begin from the time when redemption expired. But we do not understand the grounds on which the jury were instructed to find a verdict for the plaintiff. There was no distinct evidence that defendants occupied all the lands claimed; and all the testimony tends to show that there was no joint occupation at all. At any rate, the evidence was not so clear but that the jury would have been justified in finding that each defendant held what he occupied to the exclusion of the others. On this ground the judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

The Village of St. Johns v. John N. McFarlan.

Equity jurisprudence: Injunction: Village ordinance: Nuisance: Fire limits. **A court of equity has no jurisdiction to restrain the threatened violation of a village ordinance, unless the act threatened to be done would, if carried out, be a nuisance; and the erection of a wooden building within the limits of a city or village is not in and of itself a**

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nuisance, nor does the fact that it is prohibited by ordinance make it such.

Villages: Erection of wooden building: Injunction. The increased risk of fire and consequent danger to adjoining property from the erection of a wooden building in a thickly settled portion of a village, does not warrant a court of equity in interfering by injunction to restrain the erection.

Equity jurisprudence: Violation of ordinance: Remedy at law. It cannot be said that there is no adequate remedy at law because the ordinance in question is not sufficiently stringent, since it is competent for the legislature to give the village ample power to establish fire limits and enforce obedience thereto, and with a proper ordinance, framed with an appropriate penalty for all violations, the remedy would be found adequate.

Heard October 26. Decided November 2.

Appeal in Chancery from Clinton Circuit.

R. Strickland, for complainant.

Spaulding & Cranson, for defendant.

MARSTON, J:

The complainant filed its bill to restrain defendant from erecting a wooden building within certain established fire limits contrary to the provisions of an ordinance, a copy of which as set forth in the bill was as follows: "No. 1. The board of trustees of the village of St. Johns ordain, that there shall not be built, enlarged or placed upon any lot or part of a lot fronting on Clinton avenue, between Railroad and State streets, any wooden or wooden roofed building." The answer admitted that a resolution which the board of trustees termed an ordinance had been adopted, and there was no proof introduced on the subject, the case being permitted to stand in this respect upon the statement in the bill as admitted in the answer.

A court in chancery has no jurisdiction to restrain the threatened violation of a village ordinance, unless the act threatened to be done, if carried out, would be a nuisance. If it were otherwise, the court might be called upon in all classes of cases to restrain the doing of acts prohibited by

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statute.—*Mayor, etc., v. Thorne, 7 Paige, 261; Att'y Gen. v. Utica Ins. Co., 2 Johns. Ch., 370.*

The erection of a wooden building within the limits of a city or village is not in and of itself a nuisance. Neither does the fact that the erection of such is prohibited by ordinance make it a nuisance. If this were so, then the doing of any act prohibited by law would, upon the same reasoning, be a nuisance. The act, if prohibited, would be illegal; but something more than mere illegality is required to give this court jurisdiction. It was, however, insisted that the erection of a wooden building in a thickly settled portion of a village increases the danger in case of fire, and thereby injures adjoining property. There are, however, many kinds of trades and occupations, some of them prohibited by law, which, when carried on, equally tend to injure adjoining property, yet no one would contend that a court of chancery should interfere by injunction. It was also claimed that if the relief prayed for was refused there was no other adequate remedy, and that therefore the court ought to grant relief. This may be true under the ordinance set forth. That the legislature, however, can give the village power to establish fire limits and enforce obedience thereto was not denied, and could not well be. If a proper ordinance was framed with an appropriate penalty for all violations of its provisions, we think the remedy at law would be found adequate. The fact that the remedy was not adequate in this particular case, on account of the ordinance not being sufficiently stringent in its provisions, cannot give this court jurisdiction to interfere.

The decree of the court below must be affirmed, with costs.

The other Justices concurred.

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James Doak v. Alexander B. Runyan and others.

Deeds of gift: Fraud: Creditors: Execution levy. One who owns lands subject to a contract to sell and convey the same to his wife upon which a part of the purchase price remains unpaid, cannot, pending suit against him and on the eve of the judgment, make a valid deed of gift of his interest in the lands to his wife to defeat an execution levy.

Execution levy: Land contract: Vendor's interest: Legal title. A levy upon the interest in lands of an owner who was under contract to convey upon future payments, would take the legal title in full and a beneficiary interest subject to the liability of conveying on complete performance by the vendee.

Land contracts: Husband and wife: Vendee: Deed of gift: Execution levy. A wife who is under contract to purchase lands of her husband can claim no equities by virtue of a deed of gift of the lands, as against an execution levy upon the husband's interest, where the amount she still owed on the contract when she received the deed exceeded the amount required to satisfy the execution.

Heard October 26. Decided November 2.

Appeal in Chancery from Clinton Circuit.

Spaulding & Cranson, for complainant.

R. Strickland, for defendants.

CAMPBELL, J:

The bill in this cause is filed in aid of an execution, to set aside as fraudulent a deed made by Alexander B. Runyan, a judgment debtor, to his wife, and a subsequent mortgage from husband and wife to defendant Conn. The deed was made November 1, 1873, and the mortgage, November 15, 1873, for one thousand dollars, payable in five years, with ten per cent. interest. The execution was levied on the 19th of November.

The defendant Conn does not appear in this court, and as his mortgage was given for a much larger sum than he advanced, and he does not defend, this security is of no account, except as it may have some connection with the deed. The validity of the deed is the only important ques-

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tion before us. It seems to be conceded the mortgage is paid or settled.

The deed was made during the pendency of the suit on which the complainant obtained judgment, and on the eve of the judgment. The case shows beyond any doubt that the deed was made to save the land from levy. It was fraudulent, unless made on an equity prior and superior to complainant's, and to a person entitled to rely on that equity.

This is claimed by Mrs. Runyan to be her position. Her defense consists of a prior agreement to purchase from her husband, on terms which were fair and for a money consideration, and which had been fulfilled. The contract set up in the answer was a written contract dated February 2, 1869, for one thousand dollars payable in four years, and subject to all mortgages, and on payment she was to have a quit-claim deed. The deed actually given purports to be a deed of gift for a good, and not for a valuable consideration, and makes no reference to the contract. According to the written terms, the contract was payable in full in February, 1873.

The proof, assuming it to be satisfactory in quality, shows that the parties were married in 1867, when Mrs. Runyan seems to have had some property in New York, on which she realized afterwards from one thousand to one thousand five hundred dollars. She paid a note of her husband's for two hundred and eighty-one dollars in February or March, 1868. They moved on to the land in the fall of 1868, in October. Afterwards Mr. Runyan swears there was a verbal contract, the terms of which do not appear, unless inferentially taken to have been the same as the written one. Mrs. Runyan makes no reference to a verbal bargain directly. She claims to have made annual payments, and to have paid in full before the deed. She gives no dates of any payments but the note of two hundred and eighty-one dollars of 1868. Mr. Runyan produces copies of three alleged receipts, the first for two hundred and fifty dollars, dated June 2, 1868; the second for one hundred and seventy dollars, January 1,

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1872, and the third October 12, 1873, for two hundred and fifty dollars.

Upon these facts it is to be remarked that more than five hundred dollars were paid before any contract was talked of, and before they moved upon the land; that Mrs. Runyan was to take the land subject to existing mortgages, and it does not appear that her money ever went to pay any mortgage, while it is assumed there were mortgages to be paid, the amount of which should, by the terms of the contract, be added to the purchase money, or at least be a charge on her title; that only one hundred and seventy dollars is shown to have been paid after the written contract, until within a few days before the deed, and that within a month after receiving the last two hundred and fifty dollars payment the defendants made the Conn mortgage on a claim of pressing need of money.

Putting the most favorable construction on all these facts, and assuming them to be facts, the alleged verbal agreement amounts to nothing, being followed by the written one before any thing had been done under it, as well as being void. The written contract provides expressly for one thousand dollars to be paid in the future, and makes no reference to past payments as applicable. It is not shown by any testimony that the early advances made by Mrs. Runyan were loans at all, and whether loans or not they were not made on any contract or understanding concerning these lands, and cannot be credited on the contract. The answer makes no reference to any such claim.

Taking the stories to be true, Mrs. Runyan owed more than five hundred dollars on the land, aside from the mortgage burdens, when it was deeded to her. Her husband had no right to give away, as against his creditors, any title which he possessed, and he owned this title subject at best to an executory contract less than half performed. A levy upon his interest would take the legal title in full and a beneficiary interest subject to the liability of conveying on complete performance by Mrs. Runyan.

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As Mrs. Runyan, before she can claim the land, must pay more than three-fold the complainant's claim, she has no equity upon her own showing which justifies her holding the deed as against the levy.

The complainant is entitled to have the deed set aside, and to have the land sold to satisfy his judgment. He is also entitled to costs of the circuit court and of this court. Defendants may have the option of paying these costs, and the judgment and execution, with the legal expenses, in forty days.

Under these circumstances we do not deem it necessary to discuss the credibility of the testimony.

The decree below, dismissing the bill, must be reversed, with costs of both courts, and a decree rendered for complainant as above directed.

The other Justices concurred.

Miles H. Conrad v. Elizabeth Long.

Wills: Condition: Separation of husband and wife: Public policy. A condition annexed to a devise to a married woman, that she shall not live with her husband, is in violation of public policy and void.

Wills: Devise: Condition precedent. In a devise to a married woman, "upon this condition: if at any time subsequent she should conclude not to live with her present husband as his wife, but if she continue so to live as the wife of said husband until her death," then over to another, it is held there is nothing in the nature of a condition precedent.

Devise: Void condition. The condition being void, the devisee takes an estate clear of conditions.

Deeds: Certificate of acknowledgment: Married women. Defects in the certificate of the wife's acknowledgment will not exclude the deed as evidence of the transfer of the husband's title in a suit not involving the right of dower.

Evidence: Ejectment: Legal title: Oral agreement. Rejecting an offer to show by parol in an action of ejectment that some arrangement existed whereby third parties were to have some interest in the land, is not error where no offer was made to prove a deed, and no foundation was laid for giving parol evidence of any conveyance or agreement; since noth-

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ing but a conveyance of the legal title could defeat an action of ejectment.

Submitted on briefs October 27. Decided November 2.

Error to Wayne Circuit.

S. Larned and *William Aikman, Jr.*, for plaintiff in error.

George W. Coomer and *L. S. Trowbridge*, for defendant in error.

CAMPBELL, J:

Elizabeth Long sued Conrad in ejectment for the undivided half of certain lands in Wayne county. Her title, which depends on a devise, is the main matter in issue before us. It was claimed by Conrad to have been invalid upon its face.

Both parties claimed under the same source of title, which was the will of one A. S. Conrad. He devised the lands in question to his mother for life. After her death it was to go in conformity with the following clause of the will:

"To my brother Frederick S. Conrad I give and bequeath the one-half so remaining, and the other half I give and bequeath to my sister Elizabeth Long, upon this condition: if at any time subsequent she should conclude not to live with her present husband, Henry Long, as his wife. But if she continue so to live as the wife of the said Henry Long until her death, then, in that case, I give and bequeath all my property, real and personal, remaining after the burial of my mother aforesaid, to my aforesaid brother Frederick S. Conrad."

It was claimed on behalf of Conrad that the condition mentioned is a condition precedent, and is void, and that no estate could attach.

That the condition is void is admitted. It is contrary to the plainest principles of public policy to stipulate or provide in this way for a separation of husband and wife as a condition to the enjoyment of an estate. No separation

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against their will, except by divorce, is consistent with the nature of the marriage contract, which is of public as well as of private concern.

But we find here nothing in the nature of a condition precedent. The language is very blind, but it shows that the ultimate devise over to Frederick S. Conrad was to depend on whether Elizabeth Long continued to live with her husband until her death. The testator seems to have had an idea that her estate might vest and lapse from time to time, according to her leaving or remaining with her husband. This idea, of course, could not be maintained even upon a valid condition. But taking the whole clause into the account, we can only find in it a forfeiture of an estate on breach of condition, and not a condition precedent.

We think she took an estate clear of conditions. So far as the case presents any questions concerning the ambiguity of the condition or its precise meaning, we need not discuss them, for no interpretation would change the general quality of the condition as contrary to public policy, and the will must speak for itself as to its being a precedent or subsequent condition.

Error is assigned upon the reception of record evidence of a deed from Artemus Hosmer and wife to Abraham C. Truax, the objection being that the certificate of acknowledgment did not conform to the law concerning deeds of married women. But the title conveyed was that of the husband, and the deed was good against him, and the right of dower is not involved in this suit.

An attempt was made to show by George W. Coomer that some arrangement existed whereby he and one Day were to have some interest in the land. No offer was made to prove a deed, and no foundation was laid for giving parol evidence of any conveyance or agreement. As nothing but a conveyance of the legal title could defeat an action of ejectment, this testimony was properly excluded.

This embraces all the rulings complained of, which were called out by varied requests, covering in several instances

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very similar questions. There were no facts left open for the jury, and the court below very properly so held, and directed a verdict for the plaintiff below, as all material things outside of the written evidence were settled by admissions.

The judgment must be affirmed, with costs.

The other Justices concurred.

William Bonker v. John Charlesworth.

Res adjudicata: Bill to cancel a mortgage for fraud: Regularity of foreclosure. The decree in a chancery cause dismissing a bill brought to have a mortgage declared void because obtained of a minor and by fraud, and to set aside a statutory foreclosure, is held not to be a direct adjudication on the validity of the foreclosure proceedings where the regularity of those proceedings was not put in issue or contested or made the subject of evidence.

Estoppel: Mortgage: Fraud: Foreclosure. The complainant in such chancery suit is held not estopped by that decree from disputing in ejectment the validity of such foreclosure proceedings upon the ground that he was legally bound to bring them into his chancery suit and that by his failure so to do he had lost the right afterwards to question them in another suit. The validity of the mortgage, and the regularity of a statutory foreclosure of it, are not necessarily connected, but present distinct controversies that may well be made the subject of separate suits.

Submitted on briefs October 27. Decided November 2.

Error to Wayne Circuit.

Moore & Moore and *George H. Prentis,* for plaintiff in error.

Ward & Palmer, for defendant in error, cited: *1 Greenleaf Ev., §§ 522, 530, 551; Dan. Ch. Pr. (2d Am. Ed.), 1199; Getley v. Preston, 41 N. Y., 113; Collins v. Bennett, 46 N. Y., 490.*

COOLEY, J:

The controversy in this case concerns the force and effect

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of a decree in chancery in a cause in which this plaintiff was complainant, and Vreeland and Conrad, under whom defendant derives title, were defendants. That bill was filed to have a mortgage declared void because obtained from complainant by fraud and while he was a minor. The invalidity of the mortgage was fully charged, and the bill also stated that a foreclosure had been had under the power of sale contained in the mortgage, and a sale made to Conrad and Vreeland on a day named, which was a few days before the bill was filed; but it alleged no error or irregularity in the foreclosure proceedings, though it asked that the sale be set aside on the case made by the bill. An answer was filed in which the validity of the mortgage was insisted upon, and the case went to a hearing and the bill was dismissed.

It is now insisted that, in an action at law involving the title to the land covered by the mortgage, and in which defendant relies upon the foreclosure, the plaintiff is estopped by the decree in chancery from disputing the validity of the foreclosure proceedings; and the circuit judge so held.

This ruling must have proceeded on one of two grounds: *first*, that the validity of the foreclosure was at issue in the suit in chancery; or, *second*, that plaintiff had the opportunity to put it in issue, and should have done so, because it was naturally and properly a part of his case, and to leave it to form the subject of another litigation would be in effect to divide up what is properly a single controversy, and to contest in detail the several questions it presents in different suits.

Looking into the record of the chancery suit, it is apparent that the regularity of the foreclosure was not put in issue or contested. The complainant denied its validity as a deduction from the invalidity of the mortgage, but in no other way or manner. The question was not made the subject of evidence, and presumably was not within the contemplation of the judge when he decided the cause. He could not do otherwise than to dismiss the bill on the issue

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made, if the mortgage was found to be valid. We must hold, therefore, that there has been no direct adjudication on the validity of the foreclosure proceedings.

The question whether the plaintiff was legally bound to have brought the proceedings into the chancery suit is one of more difficulty; but on reflection we are not satisfied he has lost the right to dispute them by the failure to do so in that suit. The validity of the mortgage and the regularity of the foreclosure are not necessarily connected; they present different controversies altogether. They do not stand in relation to each other as two distinct grounds of invalidity in the mortgage would, for then the controversy would be one, however numerous might be the grounds of reliance. Suppose one were to file a bill to set aside a judgment as having been obtained by fraud; could he, if he failed in that suit, be debarred from contesting at law a void sale on execution because he had failed to put it in issue in his chancery suit? We think not. And the reason would be the same there as here: the validity of the sale was neither attacked in the suit in equity, nor were the proceedings necessarily in any way involved in that controversy. They might have been put in issue; but there is no rule of equity practice which requires the complainant in every instance to make his case as comprehensive as possible. If there are controversies that are really distinct, he may make them the subject of separate suits if he chooses.—See *Barker v. Cleveland, 19 Mich., 230, 238.*

Our conclusion is, that the judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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George W. Wyman and others v. John Crowley.

Practice: Abandonment of special count: Common counts. A plaintiff who has annexed the common counts to a special count upon a contract of employment, may on the trial abandon his special count, and seek to recover on the common counts.

Employment: Evidence: Verdict. Where there was evidence tending to show a promise made by an authorized agent of defendant to pay plaintiff a given sum for his services, and the facts have been properly submitted to the jury, who have found for the plaintiff, their verdict is final and conclusive.

Submitted on briefs October 27. Decided November 2.

Error to Mason Circuit.

This was an action of assumpsit brought by Crowley against Eber B. Ward in justice's court, and taken by appeal to the circuit. The action was for the value of services performed by plaintiff. The declaration contained a special count and the common counts, but before going to the jury plaintiff withdrew the special count. Plaintiff recovered and defendant brought error. Ward having died, the suit was revived in the name of his executors.

H. M. Newcombe, for plaintiffs in error.

S. D. Haight, for defendant in error.

MARSTON, J:

We have examined the several assignments set forth in the record in this case, and are satisfied that no error was committed. The plaintiff in the court below had a right to abandon the special count, and seek to recover on the common counts. There was evidence tending to show a promise made by an authorized agent of the defendant to pay the plaintiff one hundred dollars for his services. The question was properly submitted to the jury, and they having

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found for the plaintiff, their verdict is final. We do not consider the questions raised of sufficient importance to demand separate examinations.

Judgment affirmed, with costs.

The other Justices concurred.

Truman Hunt v. John D. Strew.

Evidence: Identification. It is not error to permit parol evidence in replevin, for the purpose merely of identifying the transaction, of the fact that the property in question had been taken on an execution, where the contents or validity of the execution is not sought to be shown in that way.

Evidence: Judgment: Attachment: Execution. An objection to the introduction in evidence of a justice's judgment and proceedings in a suit commenced by attachment, which only goes to the validity of the service and return of the writ, is not well taken in a suit in which an execution levy by virtue of such judgment, as well as the attachment levy, is in issue, where the judgment was rendered on an appearance of the parties, and the attachment contained a personal summons clause; for it points only to the irregularity of a step in no way essential to the jurisdiction of the justice to render the judgment.

Evidence: Admissions. Admissions of a subsequent purchaser, that he had knowledge of the attachment, are admissible in evidence where it is further shown that he admitted also that he had purchased both after and subject to the attachment.

Evidence: Fraud: Collusion. A statement of the attorney for the defendant in the attachment suit, made at the time the judgment was rendered, that he could defeat the judgment but had made up his mind not to do so, cannot be shown in evidence for the purpose of showing fraud and collusion of the attorney; for by itself it has no such tendency.

Replevin: Value: Evidence: Appraisal. The admission in evidence of the appraisal in the suit in replevin to prove value is held not error under the circumstances of this case.

Replevin: Lessor: Lessee: Possession: Right of action. Where personal property has been leased, the right to replevy during the lease is with the lessee, and not the lessor; the action of replevin is possessory, and no one not entitled to the possession can maintain it.

Replevin: Charge to the jury: Questions of fact. In an action of replevin brought by a subsequent purchaser against one holding on an execution levy by virtue of judgment in attachment, there being evidence tending to show an attachment levy, and that plaintiff bought with notice of the proceedings, it is not error to permit the fact of the attachment, and the question of fraud against creditors, to go to the jury.

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HUNT v. STREW.

Evidence: Statements: Hearsay. Statements of one's wife made in his absence cannot be shown as evidence to bind him of the facts so stated. Such statements are hearsay.

Charge to the jury: Questions not supported by any evidence. An instruction to the jury, in regard to a billiard table seized on an attachment, that if they found that under the term "billiard table" was ordinarily included the cloth, balls and other things necessary to its use, they might regard them as covered by the inventory on the attachment levy, which only mentioned "one billiard table," provided they found they were in fact included in the seizure, is misleading and erroneous where there was no evidence tending to show that any property was attached except the disjointed table.

Heard October 27. Decided November 2.

Error to Kalamazoo Circuit.

Edwards & Sherwood, for plaintiff in error, to the point that the plaintiff, being the general owner, could maintain replevin as against a mere trespasser, though he had leased the property to a third person who was in possession, cited: *Rockwell v. Saunders, 19 Barb., 473; Ely v. Ehle, 3 Comst., 506; Pangburn v. Patridge, 7 Johns., 140; Thompson v. Button, 14 Johns., 87; Mills v. Martin, 19 Johns., 31; Clark v. Skinner, 20 Johns., 465; Rogers v. Arnold, 12 Wend., 35.*

May, Buck & Powers, for defendant in error, to the same point *contra,* cited: *Collins v. Evans, 16 Pick., 63; Putnam v. Wyley, 8 Johns., 434; Rockwell v. Saunders, 19 Barb., 473; Bruce v. Westervelt, 2 E. D. Smith, 440: R. R. Co. v. Kidd, 7 Dana, 245; Walpole v. Smith, 4 Blackf., 304; Clark v. Heck, 17 Ind., 281; Belden v. Laing, 8 Mich., 500; Clark v. West, 23 Mich., 242; Cary v. Hewitt, 26 Mich., 228.*

CAMPBELL, J:

Hunt replevied from Strew a billiard table and four balls and a box of cue tips, which Strew held on an execution levy on a justice's judgment against Abner S. Brown, and which it was also claimed had first been attached in the same suit.

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The billiard table had once been owned and used by Brown in a hotel in Schoolcraft village. The balls, cloth, and some other small articles, were not identified in the same way, and reference will be made to them hereafter. On the 24th day of June, 1872, Hunt purchased the hotel and furniture, and claims to have purchased the billiard table, which was then in the house, but not put together. On this same day the attachment in question was issued and claimed to have been levied on the billiard table as it was then in the building, taken apart. It never was moved or disturbed by the constable until after the execution was levied under the judgment. When this last levy was made the constable found the table in use, and took the cloth, balls, and other articles, which were not in the building at the first levy.

Hunt went into possession of the hotel on the 25th of June, and soon thereafter leased it to one Kingsbury, who occupied it when this suit was commenced. He afterwards procured the balls, cloth and other articles, from Brown, who had them in Goshen, Indiana, where he had gone to take possession of the property which Hunt had traded with him for the hotel. The billiard table was then set up, and Kingsbury allowed to use it. On the 11th of September, 1872, the execution was levied under a judgment rendered in the attachment suit the day before. Hunt then replevied.

Judgment went against him for the amount of this execution lien, and the case comes up on error.

Hunt was the first witness on his own behalf, and gave an account of the transactions as far as necessary. He was asked on cross-examination certain questions as to whether the property had been taken on an execution in favor of the plaintiffs in attachment, Kirby and Fanckboner, and the questions were allowed. We can see no reason why they were improper. They were relevant to the issue, and it was not sought to show the contents or validity of the execution, but only to identify the transaction.

Objection is also made to several successive rulings, ad-

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mitting in evidence the attachment writ, bond, judgment, and execution. It is claimed the whole proceedings were void for want of jurisdiction, because the writ was not shown to have been properly served and returned. No objection is made to the affidavit on which it was granted.

When the writ was offered in evidence it appeared to have had an endorsement as follows: "Inventory of goods seized by the above attachment,—one billiard table." The objection made to the introduction of the writ was, that there was no proper inventory. It was not objected that there was no return. The objection to all the subsequent proceedings was the same.

The judgment was rendered on an appearance of the parties, and the writ contained a personal summons clause. The proceedings were admissible as a basis for the execution, whether there had been an attachment levy or not, and were not void on that account. This objection, then, being pointed only to the regularity of a step in no way essential to the jurisdiction of the justice to render judgment in the cause, was not well taken, because the execution levy was in issue, and the evidence was necessary and pertinent to show that the execution was regular, whether there had been an attachment properly levied or not.

An objection was also made to certain testimony of Kingsbury concerning admissions of Hunt of his knowledge of the attachment. The objection urged is, that knowledge of it obtained after his purchase would not defeat it. But whether this be so or not, there was further testimony given by Kingsbury that Hunt admitted he had purchased both after and subject to the attachment. This made it relevant, if it would not have been otherwise.

Bildad Bennett, who acted as Brown's attorney in the attachment suit, was asked on cross-examination, whether he did not tell one of the judgment creditors when the judgment was rendered, that he could defeat that judgment, but had made up his mind to let him take judgment. This was ruled out.

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The object was, as now stated, to avoid the judgment by showing fraud and collusion of the attorney. It was open to plaintiff to show there was no service of process made out, and that the attorney appeared without authority. Neither of these was attempted, and no intimation of such a purpose was given at the time. Without some such announcement the testimony was clearly immaterial, and it had by itself no tendency whatever to show either collusion or any defect of jurisdiction. It rather negatived collusion.

It is also objected that the appraisal in this suit was improperly received as evidence of value. We had occasion to consider this in *Worthington v. Hannah, 23 Mich. R., 530;* and in *Walrath v. Campbell, 28 Mich. R., 111.* Such evidence is not very conclusive; but under the circumstances of this case we cannot hold it inadmissible, and it may be questionable whether if it had been, the error could be alleged as prejudicial. The defendant recovered judgment for a lien of a small sum, the execution claim being about twenty-five dollars and interest. The plaintiff, by suing his writ out of the circuit court, asserted a value of more than one hundred dollars, and the record shows he got possession, for which he must have accepted and acted on the appraisal as the measure of his bond. It would be unreasonable now to hold this did not tend to show a value equal to that recovered.

It is also claimed to be error that the court charged the jury that if plaintiff had leased the property replevied to Kingsbury, the lessee, and not the lessor, would have the right to replevy during the lease.

Whatever may be the right of a general owner to sue wrong-doers for interference with his title, we do not think he can sue in replevin where another person has the only right of possession. The action of replevin is possessory, and although under our statutes, where a return is not had, the damages are regulated by the rights of the litigants, yet there is nowhere any indication of an intention to allow any

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one to recover as plaintiff who is not entitled to the possession. The affidavit is required to show such a right, and the whole system contemplates it. We do not understand the contrary doctrine to be maintainable under such a statute, and we have found nothing to authorize it in any case. None of the cases cited on the argument maintain any such theory.—See *contra, Putnam v. Wyley, 8 J. R., 434; Bruce v. Westervelt, 2 E. D. Smith, 446.*

We think there was some evidence tending to show an attachment levy on the billiard table, and also some evidence which was admissible to go to the jury that plaintiff bought it of Brown while in Indiana, and with notice of the action of creditors. We cannot say, therefore, that there was nothing to justify the court in permitting the fact of the attachment, and the question of fraud against creditors, to go to the jury.

There are, however, some other questions on which we think the court erred.

George Fanckboner was allowed, against objection, to relate a conversation with the wife of plaintiff in his absence, wherein he states her to have made several remarks concerning what Brown had sold to her husband, indicating that the billiard table was not included. This was hearsay, and her statements could not bind her husband in any way. There was no foundation laid for it as impeaching testimony.

The court also allowed the jury, if they found that under the term "billiard table" was ordinarily included the cloth, balls and other things necessary to its use, to regard them as covered by the inventory on the attachment levy. This was qualified by the condition that they must have been in fact included in the seizure.

But there was no evidence tending to show that any property was attached but the disjointed table. Upon this the evidence is positive from the officer, and from every one who speaks on the subject at all. There being no

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testimony to support the charge, it was misleading and erroneous.

The remaining questions are not likely to arise again.

For these errors the judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

Curtis Brace v. Archibald Brink.

Slander: Words actionable per se. Charging another with having sworn falsely and with having been indicted before the grand jury for false swearing, is slander and actionable *per se.*

Submitted on briefs October 27. Decided November 2.

Error to Wayne Circuit.

Moore & Moore, for plaintiff in error.

Moore & Griffin, for defendant in error.

MARSTON, J:

We think the court erred in excluding the evidence offered by plaintiff in this case. The slander alleged consisted in the defendant saying of the plaintiff: "You have been indicted before the grand jury for false swearing." "You swore false and I can prove it." "Brace has been indicted before the grand jury for false swearing." There were other allegations in the declaration, and the plaintiff proposed on the trial, and "offered to prove each and every allegation in his declaration contained," but the court excluded the testimony. The only question in the case is, are the words charged in the declaration as having been uttered

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by the defendant actionable *per se*. We think they are. To charge another with having been indicted before the grand jury for false swearing is a direct charge that he has been judicially accused of having committed the crime of perjury, and has been indicted therefor. When a person is indicted by the grand jury, it is generally considered to be for some supposed criminal offense. And when charged with having sworn false, and with being indicted for false swearing, it is a direct charge that the person has sworn falsely in reference to some material matter in a court of competent jurisdiction, and has thereby committed the crime of perjury, for which he has been indicted. The charge of being indicted therefor clearly and sufficiently indicates the nature and place of the false swearing charged. To charge another with swearing falsely might not be sufficient standing alone, but when coupled therewith the charge is also made that the person has been indicted therefor, this characterizes the other part of the charge, and raises it to that grade which makes it a criminal and indictable offense. Otherwise we can attach no meaning to the fact of the party's having been indicted therefor.—See *Crone v. Angell, 14 Mich., 340; Jacobs v. Fyler, 3 Hill, 572; Roberts v. Camden, 9 East, 93; Pelton v. Ward, 3 Caines, 73; Gilman v. Lowell, 8 Wend., 573.*

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

Henry Sebright v. John Moore.

Weight of evidence: Question for the jury. The weight of the evidence is a matter for the consideration of the jury only.

Estoppel: Attachment: Disclaimer: Advising proceedings. One who disclaimed ownership and advised an attachment of chattels as the property

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of another and consented to the levy, is estopped from afterwards setting up a claim of title as against such proceedings.

Heard October 28. Decided November 2.

Error to Allegan Circuit.

This was replevin brought by Sebright to recover a yoke of oxen and an ox-yoke. Moore claimed them by virtue of a sale on execution against one Hill, issued upon a judgment in favor of one Cooper. The property was first taken on an attachment, and after judgment, was sold on the execution. Hill had contracted for the purchase of this property from Sebright to be paid for in work, and the title to remain in the vendor till payment; and he had also made a like contract for the purchase of a span of horses. The defendant urged that Sebright was estopped from asserting title by reason of statements sworn to have been made by him to Cooper before he sued out his attachment. These statements were in substance, that there was enough due to Hill for work to pay for the cattle, and that Cooper should go and take the cattle, and he would take the horses, and both would get their pay. The court ruled in substance, that if Sebright had by such statements induced Cooper to institute the attachment suit and make the levy, he would be estopped from afterwards setting up title in himself as against the title derived from the attachment proceedings. There was also evidence tending to show that the title to the cattle had in fact become absolute in Hill at the time of the attachment, and the court submitted the question as one of fact to the jury. The verdict and judgment were for the defendant, and the plaintiff brought error.

Pope & Stuck, for plaintiff in error.

Littlejohn & Hart, for defendant in error.

PER CURIAM:

First. It was for the jury to weigh the evidence, and if

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they believed what Cooper and Gregory swore to, the proof went beyond what is necessary for an estoppel, and showed that Sebright actually disclaimed ownership, affirmed that Hill was owner, and advised Cooper to levy on the cattle as Hill's property. Assuming the truth of this testimony, as we must upon the point made, Sebright expressly consented to the levy, and to all the succeeding steps which appear to have been taken to bind the property for the attachment debt.

Second. The evidence given by these witnesses very plainly conduced to show that Hill was absolute owner at the time of the levy, and, with the other facts, justified the instruction concerning Hill's right at the time of Sebright's sale to him.

The judgment should be affirmed, with costs.

Anson Deyoe and another v. E. W. Jamison.

Replevin: Judgment: Right of possession. A judgment in replevin determines only the right of possession at the time, and is not inconsistent with the right of the party defeated to recover back possession afterwards under a change of circumstances.

Contracts of sale: Forfeiture: Waiver. One who has contracted to purchase personal property on credit, the title to remain in the vendor till payment, does not forfeit his rights by mere neglect to pay by the day named; and the vendor may waive his right to a forfeiture for prior neglect to pay, by seeking afterwards to collect the balance due.

Replevin: Joint defendants. There was sufficient evidence connecting the two plaintiffs in error in this case with the detention to warrant their being joined as defendants.

Heard October 29. Decided November 2.

Error to Allegan Circuit.

This was an action of replevin brought by Jamison against Deyoe and Silas Stafford and wife, for an organ. Deyoe had contracted in writing to sell and deliver the organ to

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Jamison for two hundred and forty dollars, the title to be retained by the vendor until performance. Jamison paid all but thirty dollars and interest, which was represented by his note for that sum given to Deyoe, and then sold and delivered the organ to one Delano. After default in payment Deyoe brought replevin against Delano, got possession of the instrument and recovered judgment. Jamison, having acquired Delano's rights, thereupon tendered to Deyoe the amount of the note and interest, and demanded the organ. Deyoe referred him to Stafford. Jamison called at Stafford's, but found him absent. He, however, saw Mrs. Stafford, who then had possession of the organ, and tendered her the money to pay the note, but she refused to accept it, stating that the organ was Deyoe's. Afterwards tender was also made to Stafford, and refused. Thereupon Jamison sued out this writ of replevin, but was unable to get possession of the property. On the trial it was made to appear that pending the replevin suit against Delano, Deyoe had sold and delivered the organ to Mrs. Stafford, and that Mr. Stafford had no connection with the matter. The jury found a verdict in favor of Mr. Stafford, but found against the other defendants, and assessed the value of the property at two hundred dollars, and the damages for the detention at five dollars, and judgment was rendered accordingly. The defendants, Deyoe and Mrs. Stafford, bring error.

Silas Stafford, Fenn & Hart and *F. J. Littlejohn*, for plaintiffs in error.

Jacob V. Rogers, for defendant in error.

PER CURIAM:

This case is covered by the previous decisions of this court. The first replevin suit only determined the right of Deyoe to the possession of the organ at that time, and was not inconsistent with the right of Delano or Jamison to recover possession when the remainder of the purchase price

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was paid or tendered. This right was not one which would be forfeited by mere neglect to pay by the day named. And if Deyoe could have a right to terminate it in that event, there was evidence from which the jury might infer, as they did, that he had waived it by seeking to collect the balance afterwards. On the main point in the case reference is made to *Preston v. Whitney, 23 Mich., 260; Johnston v. Whittemore, 27 Mich., 463; Giddey v. Altman, 27 Mich., 209.* There was sufficient evidence connecting the two plaintiffs in error with the detention, to warrant their being joined as defendants.

The judgment is affirmed, with costs.

William Shepard and another v. John B. Cross.

Exemptions: Purchase price claims: Promissory note: Transferee: Original consideration. A transferee of a note given for the purchase price of the property is not entitled to claim that as to his judgment on such note the property, though otherwise exempt, is liable to execution by virtue of the exception in favor of purchase price claims. It is not admissible for the purpose of bringing a case within this exception to trace the original consideration through successive changes and substitutions.

Exemptions: Husband and wife: Replevin: Misjoinder. Exemptions from execution being intended for the benefit of the family, a joint replevin suit by husband and wife to preserve this benefit is admissible under our statute, which expressly confers upon the wife the right to sue alone, and does not forbid a joint suit.

Heard October 29. Decided November 2.

Error to Clinton Circuit.

R. Strickland, for plaintiffs in error.

A. Stout, for defendant in error.

PER CURIAM:

One of the plaintiffs in error (William Shepard) bought a

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horse of one Mary Love for one hundred and ten dollars. The bargain was made with her son, George Love, to whom Shepard paid ten dollars of the purchase price and made his note to him for the balance. By a subsequent arrangement this note was taken up and one made in lieu of it by Shepard to Mrs. Love upon a year's time with interest. Mrs. Love transferred this last note to Gordon Dunlap, and he recovered judgment upon it against Shepard before a justice. Upon that judgment an execution was issued and placed in the hands of Cross, who was a constable, for collection. He levied on the horse before mentioned, and the plaintiffs in error replevied it and thereby regained possession.

The judge before whom the cause was tried without a jury found these facts, and also that the horse was exempt except for purchase money, and it was held that the plaintiffs in error were not entitled to recover, and judgment was given against them for one hundred and seven dollars and fifty-one cents and costs.

First. It is urged for defendants that Dunlap's judgment was for the purchase price of the horse, and that as a consequence there was no exemption and no right of action.

The suit by Dunlap was on the note as a distinct security, and he was a transferee and not the party to whom it was originally made. The consideration for which it was given was not sued for, and the judgment was not rendered for it. That consideration was not the subject of his purchase, and it was never transferred to him. What he obtained was Shepard's executory promise to pay one hundred dollars and interest, and nothing more. When Mrs. Love elected to transfer the note to him, she elected to consider the note as payment for the horse, and if there was any previous right in her, or in any body else, to claim the horse upon execution as not exempt against the debt, it existed no longer.

In many cases where the seller of property takes the buyer's note for it he may waive recovery upon it and recover upon the original consideration; but a transferee of

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the note, who is a stranger to such consideration, cannot do it. If a first transferee could take the property for which the note was given, as not exempt for the purchase price, any other transferee, however remote, could do so, and very strange and unjust results would be produced. The facts in this case disclose another difficulty. Here the note first given for the horse is not the note transferred to Dunlap. The note on which he obtained judgment is one which was given to Mrs. Love in place of the first, and if the doctrine contended for were maintained, a right would be recognized to trace an original consideration through any number of successive changes and substitutions in order to bind the property for which the first note was given. A bare statement of the matter is enough to show the unsoundness of what is claimed.

Second. It is urged lastly that if the horse was exempt from Dunlap's execution, the plaintiffs, as husband and wife, could not join in replevin to regain possession; but one or the other should have sued alone. We see nothing in this claim. These exemptions are intended for the benefit of the family, and not merely for some one member of it, and the object of the suit is to preserve this benefit which the law sanctions.

Formerly the wife could not sue at all in such a case, and the assertion of all right of exemption depended upon the will of the husband, and it often happened that where there was the most reason in the circumstances of the family for the maintenance of the exemption, the weakness or vice of the husband rendered the right abortive.

To avoid this the legislature provided that the wife might sue alone, that is, might sue without her husband. It was not the object of the legislature to preclude the husband from suing, or to compel either to sue alone. The purpose was to make the right more remedial, to increase the facilities for guarding it, and a joint suit was not forbidden. We see no objection whatever to a joinder in such a case. The objection we have noticed being removed, the plaintiffs in

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error were entitled to recover upon the facts found, and the result is, that the judgment below must be reversed, and one entered for the plaintiffs in error, with costs of both courts.

Hiram Jennison v. Charles Stone and another.

Land contracts: Cutting timber: Promissory notes: Defense: Damages. Parties under contract to purchase land and to keep the premises in as good condition as at the date of the contract until by their payments they become entitled to a deed, are not at liberty in the meantime to take off the timber; and they cannot set up in defense to their note for the contract price of the lands, damages suffered by them in being deprived, by reason of defects in the title, of the opportunity of lumbering on the premises. One cannot be damnified by being deprived of the opportunity of doing what he has no right to do.

Settlements: Conflicting claims: Concessions made under protest: Defense reserved. While settlements of conflicting claims will not be opened to inquire into the equities, yet such protection is not afforded to a transaction where what the party gives is given under protest that it is not payable, and with an understanding that he reserves his defense to it; a settlement in the nature of a compromise must be made as such, and so understood on both sides.

Promissory notes: Land contracts: Interest: Want of consideration. A note given for the balance due, with interest, on a land contract not drawing interest, on an understanding that the question of the liability to pay interest should nevertheless remain open, is held to be, as to the amount of such interest, without consideration and not enforcible.

Heard and decided November 2.

Case made from Kent Circuit.

Norris, Blair & Stone, for plaintiff.

Taggart, Allen & Wolcott, for defendants.

COOLEY, J:

The suit between these parties is upon a promissory note given by the defendants in closing up with plaintiff a contract they had made with one Newton for the purchase of lands, and which had been assigned to the plaintiff. Two

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defenses were made to the note. *First*, That by reason of defects in Newton's title at the time the contract was entered into, they were deprived of the occupation of the land, and of the opportunity to take timber from it as they desired, for a considerable period, until the title was perfected; and *second*, that there was included in the note a sum for interest on the last instalment of the land contract, when the contract called for none.

The first defense was properly overruled. It appears by the contract that the purchasers were to keep the premises "in as good condition" as they were at the date of the contract, until by their payments they became entitled to a deed; and this would preclude their taking off timber until that time. The damages they claimed were for loss of the opportunity to lumber upon the premises prior to that period, and when, consequently, there could have been no legal damages. A man cannot be damnified by being deprived of the opportunity of doing what he has no right to do.

The second defense seems to have been rejected on the ground that the note sued upon was given on a settlement between the parties, and after plaintiff had refused to settle with defendants except for the amount promised to be paid by it. If the facts were that this note was given in settlement of conflicting claims of these parties, then, under the previous rulings of this court, we should not inquire into the equities, even though it should be asserted or made to appear that something was included in it which the plaintiff had no lawful right to.—*Moore v. Detroit Locomotive Works, 14 Mich., 266.* But if defendants should be able to show that the facts were as they claim, this would not be such a case. They offered to show that when the note was given they expressly claimed and insisted that the sum included therein as interest on the last instalment of the land contract was not demandable on the contract, and that they gave the note after being assured by counsel present representing both parties, that their defense to the note to that extent would be valid if it should prove that they were not

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liable for the interest in dispute. This evidence would show that the defendants did not give the note in settlement, or understand that it was so taken.

Had the note in suit included nothing but this item of interest, which turns out by the contract not to have been payable, it would have been a plain case of a contract without consideration. Parol evidence is always admissible to show that a contract, though apparently valid, has nothing to support it. "Some consideration there must be, or it will be void as a *nudum factum* between the parties."—*Parsons, Ch. J.*, in *Fowler v. Shearer, 7 Mass., 14–22.* It is not sufficient that the contract imports a consideration; there must be one in fact. Here the land contract fails to supply the consideration, and the plaintiff would be compelled to fall back upon the alleged settlement. But that is no settlement where what the party gives is given under protest that it is not payable, and with an understanding that he reserves his defense to it. A settlement in the nature of a compromise must be made as such, and so understood on both sides.

It is immaterial that in this case the note included something further. This fact only makes it a case of partial failure of consideration, instead of total.

Judgment reversed, with costs, and a new trial ordered.

The other Justices concurred.

Alonzo B. Rudd v. Lewey C. Rudd.

Equity pleading and practice: Proofs must sustain bill. A complainant in a chancery cause is bound, in order to be entitled to relief, to prove his case substantially as he alleges it.

Divorce: Separation: Desertion. A separation of husband and wife by the latter going to her father's, to constitute a basis for divorce under our statute upon the ground of desertion, must have commenced at least

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two years prior to the filing of the bill and continued during the whole period without interruption; and mutual treaties and deliberations within that period with a view to living together again are inconsistent with the kind of desertion the statute has in view as a ground of divorce.

Heard October 27. Decided November 3.

Appeal in Chancery from Cass Circuit.

John A. Talbot, for complainant.

Andrew J. Smith, for defendant.

GRAVES, CH. J:

Complainant sued for a divorce on a charge of desertion, and his case was dismissed. He filed his bill on the 6th day of November, 1873, and alleged the marriage on the 20th day of January, 1869, and averred that his wife deserted on the 5th day of November, 1871, or two years to a day prior to the filing of the bill. He was bound to prove his case in substance as stated, and hence was bound to show an actual desertion begun at least as early as November 5th, 1871, and continued without interruption to the time of filing the bill.—*Cooper v. Cooper, 17 Mich., 205; Porritt v. Porritt, 18 Mich., 420.* There is no evidence or claim of an act of desertion earlier than the time averred, and the proof is, that the defendant went to her father's and has since remained there. We have carefully examined all the testimony and are not satisfied it amounts to proof that when the defendant went to her father's she designed absolutely to break off all matrimonial cohabitation for the future; and this difficulty in complainant's case is increased by the proof that the parties met afterwards and treated upon measures for living together. This last proof goes further than to show entreaties and tender of kind offices by him to induce her to return, and which she rejected. It favors the idea that the parties were *mutually* consulting and deliberating upon a basis for living and consorting as husband and wife, and goes to negative the proposition that either party considered that matrimonial cohabitation was not to be resumed

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or continued. The result is, that in our opinion the bill is not maintained by the proofs, and that the decree should therefore be affirmed, with costs.

The other Justices concurred.

Charles O. Hamlin v. Richard Mack.

Distress damage feasant: Common-law remedy. The right of distress damage feasant existed at common law and is not a creature of the statute, though legislation has been adopted to regulate its exercise; so that it is inaccurate to speak of this remedy as something merely statutory and in derogation of the common-law rights of property.

Distrained animals: Rescue: Regularity of the distress: Replevin. One sued under the statute (*Comp. L.*, § *6782*) for a rescue of beasts distrained or impounded cannot bring into question the regularity of the distrainor's proceedings; he is expressly remitted to his action of replevin to test the validity of those proceedings.

Distress damage feasant. The taking of another's beast when trespassing on the taker's land, and confining it in his barn, is sufficient to constitute a lawful distress damage feasant.

Distrained animals: Rescue: Violence: Unlawful taking. The taking away and setting at liberty against law a distrained animal constitutes a rescue, and it is not necessary that positive violence, or menacing or threatening words should be employed to characterize the act as a rescue; and such a taking is esteemed in law a violent taking.

Heard October 29. Decided November 3.

Error to Allegan Circuit.

Pope & Stuck, for plaintiff in error.

W. A. Woodworth, Fenn & Hart and *F. J. Littlejohn,* for defendant in error.

GRAVES, CH. J:

Hamlin sued Mack and based his action on § *6782 C. L.*, which reads as follows: "If any person shall rescue any beasts distrained or impounded for any cause, he shall

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be liable to an action on the case, to be brought by any person injured, to pay all damages which such person shall have sustained thereby, and all the fees and charges which shall have been incurred before the rescue, and shall also forfeit a sum not less than five nor more than twenty dollars."

The declaration alleged that he, Hamlin, seized a heifer doing damage in his field, that there was no township pound and he impounded her in his barn, and there fed and took care of her from November 10th, 1873, to the 5th of the following February, and that Mack rescued her. The declaration then set up a claim for various items of damages. The cause being on trial before a jury, a discussion arose as to the range and admission of proof, when the judge intimated a decided opinion that the plaintiff would not be entitled to recover unless he showed a regular impounding under the statute and an adherence to the directions of the statute in regard to the subsequent steps.

The plaintiff's counsel thereupon proposed to shorten the trial by stating in the form of an offer of proof the precise facts he expected to show to secure a recovery, and this course being assented to by counsel for defendant, the plaintiff's counsel made offer to show that on *November 10th, 1873, the plaintiff found the heifer doing damage on his premises, that there was no township pound, that he took her and confined her in his barn and supplied her with proper food and water until February 5th, thereafter;* that within twenty-four hours he gave verbal notice to one who had owned her, and requested him to pay damages and take her away; that this person disclaimed ownership, and said he had sold the heifer before that to another person named; that in the same week and five or six days after, he, the plaintiff, called on the person who was said to have purchased, and gave him verbal notice, and desired him to pay charges and take the heifer away; that this person also disclaimed ownership; that on the 26th of the same November plaintiff filed with the township clerk a notice, describing the heifer, stating that he had taken her up at his farm, on or about the 20th,

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and that the owner was requested to prove property, pay charges and take the beast away; that a copy was forwarded by the township clerk to the county clerk; that on the 10th of December following he published a like notice in a county newspaper; that on the 5th of February following, the defendant took the heifer from the plaintiff's possession without his consent.

On objection by defendant's counsel the court rejected the offer and directed the jury to find for defendant, which was done accordingly.

The plaintiff's counsel contends that in case of lawful distress and impounding, and non-observance thereafter (which was the case here), of the steps marked out by statute to be taken by the distrainor, the owner is expressly restricted to replevin under *ch. 214, C. L.*, if he would take advantage of such illegalities; and that if instead of resorting to replevin to regain his property, he rescues it out of the distrainor's possession, and the latter thereupon sues in case upon this statute (§ *6782 C. L.*), the rescuer is precluded from setting up such subsequent illegalities, and they constitute no defense whatever. And he further insists that the offer in question embraced a state of facts showing a lawful distress and impounding by him and an illegal rescue by the defendant, and that the ruling of the court was therefore wrong. If these positions are correct, the conclusion that the court erred is of course also correct. The learned counsel for defendant contends that the remedy sought by the plaintiff is purely statutory and derogatory to the common-law rights of property owners and should be construed strictly, and that in compliance with all material provisions of the statute ought to be insisted on; that under *ch. 214 C. L.*, the party trespassed upon by cattle has an election of remedies, and may sue in trespass, or distrain and impound, and that in case he distrains and impounds, the distress can only be rendered lawful by strict compliance with the statutory requirements. And that a rescue involves a *forcible* taking back of the beast when lawfully impounded,

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and requires something more than a mere taking without leave; that there must be violent acts or menacing or threatening words.

The right of distress damage feasant existed at common law and was not introduced by statute.—*1st Inst., 142 a, 161 a.*

It sprang from a felt necessity for a summary and direct remedy against the beasts committing damage, and also for some guard against possible incentives to do hurt to them or put them out of the way. The owner might not be discoverable, or be in a situation to be reached by process, or if discovered and within the reach of process, there might be impediments to any redress by an ordinary action. And if the beasts could not be held, the injured party might be moved to misuse them or put them in a way to be lost to the owner. The right itself, with several incidents, being established at common law, acts were passed in England to regulate its exercise, and the same course has been taken here.

It is scarcely correct, therefore, to speak of the remedy by distress damage feasant as something merely statutory and in derogation of the common-law rights of property.

The right being admitted, it was needful to frame guards, not only against wrongs likely to be done under color of it, but also against violations likely to be committed against the right itself, under color of the very guards intended merely to prevent its being resorted to as a cloak for wrong.

As a safeguard in certain cases against the carrying on of proceedings in the assumed exercise or furtherance of the right of distress, the law admitted the right of rescue, but as this latter right was subject to be perverted and made an instrument to thwart the right of distress in cases when it was considered it ought not to be interfered with, and also subject to be resorted to in such manner and on such occasions as to give rise to unseemly wrangles and collisions, it was at length settled that generally, in case of an asserted distress, the regularity of the proceedings should not be left

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to the judgment or caprice of the party, but should be triable exclusively in a court of law, and in a specific proceeding, to be instituted by the party claiming the distrained beasts.

Our law now in question is framed on this principle.

This appears pretty plainly on reading the section first quoted, and on which the present declaration is based, and the section which immediately succeeds. The latter section, being § *6783*, is as follows:

"The defendant in any action brought for rescuing beasts distrained or impounded, shall not be allowed to allege or give in evidence the insufficiency of the fences, or any other fact or circumstance to show that the distress or impounding was illegal; but if there is any ground of objection to the proceeding, of which he is entitled to avail himself, he may have the advantage thereof in an action of replevin, to be brought as provided in the following sections."

In view of these provisions it cannot be maintained that one sued on *section 6782* can bring into question the regularity of the distrainor's proceedings. That is forbidden. He may of course controvert the allegation of rescue and every fact bound up with it.

He is expressly remitted to his action of replevin to test the validity of the course of the distrainor, and he cannot regain his property by rescue, and when sued therefor on the statute, proceed to defend on the ground that the distrainor did not follow out the statute.

The offer of the plaintiff embraced facts to show a lawful distress damage feasant. There was no township pound, and the plaintiff personally took the beast when trespassing on his land, and confined it in his barn there. Before this act the beast in contemplation of law was in the owner's possession, but the seizure of it damage feasant, and immediate confinement of it by the plaintiff in his barn there, took it out of the owner's possession and into the plaintiff's

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custody, and this was enough to constitute a distress damage feasant.—*3 B. C. 6; Broom and Had. Com., B. 2, p. 74.*

The offer made included sufficient matter to prove a rescue. It was not necessary that positive violence, or menacing, or threatening words should be employed to characterize the act as a rescue of the beast. The taking away and setting at liberty against law the distrained animal, constitutes a rescue.—*1 Inst., 160 b; Bac. Ab., "Rescue" a; 1 Whea. Sel., 689.* Such a taking is esteemed in law a violent taking.

The facts offered showed a lawful distress and impounding, and the taking away and setting at liberty by the defendant, without the consent of the plaintiff, was a taking away and setting at liberty against law. The proposed facts, then, if admitted, would have shown, in the absence of any countervailing circumstance, a rescue by the defendant. And the statute forbade any showing by the latter of irregularities alleged by the defendant in the course taken by the plaintiff.

The plaintiff was therefore warranted in his offer, and the court erred in rejecting it. No question has been made as to what were proper items of damage, and we are not to be understood as saying that those claimed for irregular proceedings, or for the keep of the animal in the course of such proceedings, would be recoverable.

The judgment should be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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The City of Grand Rapids v. George A. Whittlesey

Streets: Title: City: Ejectment. A city has not such a valid subsisting interest in the lands embraced in its streets as will authorize it to maintain ejectment under our statute; and the disability is a fundamental one and is not required to be raised by demurrer or plea in abatement.

Control and supervision of streets: Ejectment. The charter provision conferring upon the city the supervision and control of its streets was not designed to give the right to maintain ejectment, nor any thing more than the usual power possessed by township officers over country ways, to care for them and keep them in repair and to prevent and remove encroachments and obstructions.

Submitted on briefs and decided November 3.

Case made from Recorder's Court of Grand Rapids.

James W. Ransom, for plaintiff.

Laurens W. Wolcott, for defendant.

PER CURIAM:

The city sued in the court below in ejectment for a street within its limits, and the court allowed a recovery. The cause comes up on a case. The defendant seems to have made no objection to the form of the action, and the plaintiff's counsel insists: *first,* that there was no ground for any; and *second,* that if there was, the objection should have been made by plea in abatement or by demurrer. On the first point he cites *Dillon on Corp.,* § *523.* The text, it is true, goes to support the position, but the authorities cited we think fail to support it. But however that may be, our statute forbids ejectment when the party suing has not, when he commences his suit, a valid subsisting interest in the premises claimed.—§ *6206, C. L.* And the city has no such interest here. The question is a fundamental one, and goes to the right of the court to give judgment of recovery. The action is foreign to any right claimed, and

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no case is made for any judgment for plaintiff. There was no necessity for a demurrer or plea in abatement, because it appeared affirmatively that the remedy was unwarranted, and the failure to raise the point by pleading or otherwise in the court below would not authorize a form of proceeding and judgment in it which the statute inhibits.

The circumstance that the charter of the city gives the corporation the supervision and control of all the streets does not help the case. This is nothing more than the power possessed by township officers over country ways, and the power usually given to cities over their streets. Our laws have made particular provisions for the care of streets and ways, and the prevention and removal of encroachments and obstructions. And it has never been supposed that ejectment could be maintained for any such purpose. The objection is fatal and cannot be ignored.

The judgment must be reversed, and one entered here for the defendant, with the costs of both courts.

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JANUARY TERM, 1876.

The People on the relation of Edwin W. Worden v. The Judge of Manistee Circuit.

Writ of error: Bond to stay execution: Return made: Order nunc pro tunc: Supersedeas. After return made of writ of error the circuit court has no authority, where no bond under the statute (*Comp. L. 1871, § 7122*) has been filed to stay or supersede execution, to allow a bond to be filed *nunc pro tunc* and operate as a *supersedeas;* the power, if any, after return to grant such relief is in the supreme court.

Heard and decided January 4.

Application for *Mandamus.*

The respondent at chambers, upon the *ex parte* application of the attorneys of a plaintiff in error who "at the time of serving the writ" of error (*Comp. L. 1871, § 7122*) had neglected to file a bond to stay or supersede execution, ordered that plaintiff in error have leave to file such bond *nunc pro tunc,* and thereby have recalled a previously issued execution. The application for such order, and the order, were both made after return had been made to the supreme court of the writ of error. Application is now made by defendant in error, upon notice and appearance by respondent, for *mandamus* to vacate such order.

S. W. Fowler, for relator.

L. D. Norris, for respondent, cited *Comp. L. 1871, § 4949,* and argued that the order complained of was in its nature a writ of *supersedeas,* and that although the writ of error brought the record to the supreme court, yet the execution issuing, if at all, from the circuit, that

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court would seem to be the proper tribunal to control it; and further, that the provision as to the precise day of filing the *supersedeas* bond might wisely be held directory.

THE COURT held that if any power existed after return made to the writ of error, to allow the bond to be filed *nunc pro tunc* and operate as a *supersedeas*, it was in the supreme court, where the judgment had been removed, and that the circuit court had no authority to make the order complained of.

Writ granted.

The People v. Walter Clark.

Seduction: Distinct acts: Election: Evidence. Under an information for seduction the introduction of evidence tending to prove one distinct substantive offense is a sufficient election, without any express announcement to that effect, of such offense as the one upon which alone a conviction will be sought, to preclude the proof of any other substantive offense as the basis of a conviction.

Seduction: Evidence: Subsequent acts. Subsequent acts of intercourse cannot be given in evidence, on a trial for seduction, as corroborating testimony, for they have no such tendency.

Seduction: Illicit intercourse: Promise: Chastity. Illicit intercourse alone does not constitute seduction, but the complainant must have yielded to some sufficient promise or inducement, and have been thereby drawn aside from the path of virtue she was honestly pursuing at the time.

Seduction: Frequent repetitions: Reformation: Evidence. Where it appears that illicit intercourse was had between the parties as opportunity offered, at short intervals, to warrant a conviction of seduction for the second or third or later act there should be clear and satisfactory proof of reformation.

Seduction. Where a woman willingly submits to indulge a criminal desire, the fact that a promise of marriage is made as matter of form merely, is not enough of itself to characterize the act as seduction.

Seduction: Illicit intercourse: Promise: Chastity. Illicit intercourse in reliance upon a promise made is not alone sufficient to make the act seduction, but the nature of the promise and the previous character of the woman for chastity must be considered.

Seduction: Previous seduction: Reformation: Presumption. A woman who has been before seduced and has reformed may be again the subject of

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seduction; and where a reasonable time elapsed between the different acts, a presumption in favor of reformation may arise; but where the repetitions are frequent and the intervals short, as in this case, no such presumption arises, and the burden of proving reformation is upon the prosecution.

Seduction: Previous chastity: Evidence. It is competent on a trial for seduction, for the defense to show that the prosecutrix had, previous to the alleged offense, had illicit connection with another man, the chastity of the female at that time being in all cases involved.

Seduction: Evidence: Preliminary examination. It is not competent to show that the complainant, though present, was not sworn and examined before the magistrate on the preliminary examination of the defendant for the offense in question.

Seduction: Evidence: Conspiracy. Evidence of a conspiracy between complainant and her father and mother to inveigle the defendant into a marriage with complainant, and failing of this to prosecute him, is admissible on a trial for seduction.

Evidence: Experts: Opinions: Physicians: Sexual intercourse. The opinions of medical experts, that sexual intercourse under the circumstances described by the complainant, *i. e.*, in a buggy, was highly improbable, if not impossible, and also as to the pain and suffering the complainant would have experienced had such an act taken place, are held admissible.

Commencement of prosecution: Statute of limitations. The issuing of a warrant in good faith and delivery to an officer to execute, where the defendant was afterwards arrested upon that warrant and bound over for trial, is a sufficient commencement of the prosecution to satisfy the requirement of the statute of limitations.

Waiver: Information: Pleading. The defendant, by pleading to the information, waives all objection on the ground that as but one offense was charged in the warrant no other offense could be set forth in the information.

Heard October 7. Decided January 5.

Exceptions from Calhoun Circuit.

Andrew J. Smith, Attorney General, for the People.

John C. Fitzgerald and *C. I. Walker,* for respondent.

MARSTON, J:

The defendant was convicted for the seduction of Alice J. Morey. There were three counts in the information: the *first* charged him with committing the offense on the 28th of July, 1873, in the county of Calhoun; the *second,* with the commission of a like offense on the same day in the township of Penfield, in said county; and the *third,*

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with a like offense, under and by means of a promise of marriage, on the same day, in the county of Calhoun.

Upon the trial the prosecution introduced the complaining witness, who gave evidence tending to prove an act of seduction, in the town of Penfield, July 28th 1873. The prosecution then offered to prove a distinct and subsequent act of seduction, stating for the first time, that they relied upon this instance, and not the one already proven, for conviction. This was objected to, but admitted, the court remarking that the prosecution would have to elect one particular act or transaction to put before the jury. The prosecution then offered to prove a third distinct act, which occurred subsequent to the first act proven to have taken place in the town of Penfield, but prior to the second act already proven. This was also objected to, but admitted.

After the close of the argument, but before the court charged the jury, the prosecuting attorney stated to the court, in the hearing of the jury, that he relied upon the last act of intercourse, which was the second proved, and that if the court desired him to elect, he would elect that act; no election, however, was made; and the court charged the jury that it was sufficient if the prosecution had proved the offense committed at any time within a year prior to the 24th of June, 1874, that being the time when the prosecution was commenced; and refused to charge, that the prosecution having first put in evidence tending to show that the defendant committed the offense in Penfield, on the 28th of July, they were not at liberty to prove any subsequent offense committed elsewhere, for any purpose; and that the jury could not consider the evidence of such subsequent offense for any purpose whatever.

It was decided in *People v. Jenness, 5 Mich., 327*, that the prosecution, before the evidence was introduced, could select any one act of criminal intercourse, such as was charged in the information, which occurred within the jurisdiction of the court and within the period of the statute of limitations, but when evidence had been introduced tending directly

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to the proof of one act, for the purpose of procuring a conviction upon it, the prosecutor had thereby made his election and could not be allowed to prove any other act of the kind as a substantive offense upon which a conviction might be had in the cause.

Upon this question we consider the ruling in that case decisive. The act alleged to have been committed in the buggy, in the town of Penfield, being the first to which evidence was introduced, was the only offense upon which the defendant could be tried; and if proof of subsequent acts were admissible at all, they could not be admitted as distinct offenses to go to the jury and upon which the defendant might be convicted. It was not necessary for the prosecution to expressly elect for which act they would try the defendant in order to bind them. The fact of their introducing evidence tending to prove a distinct substantive offense was a sufficient election. In this case under the charge as given, there was no certainty whatever that the jurors all united upon the same act in finding the defendant guilty.

Nor could the prosecution after having thus introduced evidence tending to show an offense committed in the town of Penfield, on the 28th of July, show subsequent acts as corroborating testimony, as they would have no such tendency. Proof of previous acts of sexual intercourse would tend to show a much greater probability of the commission of a similar act charged to have occurred subsequent thereto, but the converse of this proposition would not be true, as the proof of a crime committed by parties on a certain day could have no tendency to prove that they had, previous thereto, committed a similar offense.—*People v. Jenness, supra; Templeton v. The People, 27 Mich., 501; The People v. Schweitzer, 23 Mich., 304.*

There is still another serious objection to the prosecution relying upon the second or third act proven in this case for a conviction. It appeared from the testimony of the complaining witness that the first offense was committed, if at

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all, on the 28th of July, 1873; that the second and third offenses were committed, if at all, during the month of August following, but at what particular time she was unable to state. And upon cross-examination she gave testimony tending to prove several distinct acts of intercourse, in all instances connected with a promise of marriage, in the months of July and August, and all subsequent to the 28th of July.

Illicit intercourse alone would not constitute the offense charged. In addition to this the complainant, relying upon some sufficient promise or inducement, and without which she would not have yielded, must have been drawn aside from the path of virtue she was honestly pursuing at the time the offense charged was committed. Now, from her own testimony it would seem that the parties had illicit intercourse as opportunity offered. "Such is the force and ungovernable nature of this passion, and so likely is its indulgence to be continued between the same parties, when once yielded to, that the constitution of the human mind must be entirely changed before any man's judgment can resist the conclusion" that where parties thus indulge their criminal desires it shows a willingness upon her part that a person of chaste character would not be guilty of, and that although a promise of marriage may have been made at each time as an inducement, it would be but a mere matter of form, and could not alone safely be relied upon to establish the fact that she would not have yielded had such a promise not been made.

We do not wish to be understood as saying that, even as between the same parties, there could not be a second or even third act of seduction; but where the subsequent alleged acts follow the first so closely, they destroy the presumption of chastity which would otherwise prevail, and there should be clear and satisfactory proof that the complainant had in truth and fact reformed, otherwise there could be no seduction. The object of this statute was not to punish illicit cohabitation. Its object was to punish the

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seducer, who, by his arts and persuasions, prevails over the chastity of an unmarried woman, and who thus draws her aside from the path of duty and rectitude she was pursuing. If, however, she had already fallen, and was not at the time pursuing this path, but willingly submitted to his embraces as opportunity offered, the mere fact of a promise made at the time would not make the act seduction.

Nor will illicit intercourse which takes place in consequence of, and in reliance upon a promise made, make the act seduction. If this were so, then the common prostitute, who is willing to sell her person to any man, might afterwards make the act seduction by proving that she yielded relying upon the promise of compensation made her by the man, and without which she would not have submitted to his embraces. Illicit intercourse, in reliance upon a promise made, is not sufficient, therefore, to make the act seduction. The nature of the promise, and the previous character of the woman as to chastity, must be considered. And although the female may have previously left the path of virtue on account of the seductive arts and persuasions of the accused or some other person, yet if she has repented of that act and reformed, she may again be seduced. We do not say that there may not have been a reformation in this case; indeed there may have been many, but they were unfortunately fleeting. Had a reasonable time elapsed between the different acts, a presumption in favor of a reformation might arise, but we think no such presumption could arise in this case, and that the burden of proving such would be upon the prosecution.

In this connection we may discuss another question raised. Upon cross-examination of the complaining witness she was asked whether previous to this time she had ever had connection with any other man. This was objected to as irrelevant, and the objection was sustained. It does not clearly appear from the record what particular time the question referred to, whether to a time previous to the first alleged act of intercourse with the defendant, or previous to

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the trial. If the latter, the ruling was clearly correct.—*People v. Brewer, 27 Mich., 134.* If the former, then we think the question, under the objection made, was proper. In the examination of this question, and also of the one last discussed, we have derived but little benefit from an examination of the authorities. Seduction was not punishable by indictment at common law, and the cases which discuss these questions are all under statutes which differ in some respect from ours.

In most of the states their statute makes the seduction of a woman of "previous chaste character" an indictable offense, while there are no such words, nor any of like import in ours,—and the courts have held that the words "previous chaste character" means that she shall possess actual personal virtue, in distinction to a good reputation, and that a single act of illicit connection may therefore be shown on behalf of the defendant. If, however, we are correct in what we have already said upon the question as to what is necessary to make an act of illicit intercourse seduction, then the chastity of the female at the time of the alleged act is in all cases involved, and the presumption of law being in favor of chastity, the defense have a right to show the contrary. This, upon principle, we consider the correct doctrine, and that it necessarily follows from what we have said upon the other question. As bearing upon these questions we refer to *Carpenter v. The People, 8 Barb., 603; State v. Shean, 32 Iowa, 88; Kenyon v. The People, 26 N. Y., 203; State v. Carron, 18 Iowa, 372; Andre v. The State, 5 Iowa, 389; Boak v. The State, 5 Iowa, 430; Cook v. The People, 2 Thompson & C. (N. Y.), 404; Crozier v. The People, 1 Harris C. C., 453; Safford v. The People, Id., 474; State v. Sutherland, 30 Iowa, 570.*

The defense offered to prove that during the examination of the defendant for this offense, the complainant was present but was not examined. This was excluded, and we think rightly. The complaining witness, of her own motion,

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could not take the stand as a witness upon that examination. The prosecuting attorney need not necessarily be present, but even if he were, we think at that stage of the proceedings he must have some discretion given him as to what witnesses he should call, and his omission to call any particular witness cannot be made a subject of criticism upon the trial in the circuit.

The defense also offered certain evidence tending to show a plan between the complainant, her father and mother, to inveigle the defendant into a marriage with the complainant, and failing, to prosecute him. This was their theory of the case, and for this purpose the evidence was admissible. This is an offense where it is very difficult for the defense to present any direct evidence to disprove the charge, as third parties are not usually called in to witness such transactions, although in this case it does appear that complainant's mother did find them in bed together on one occasion. She, however, whether discreetly or not, kept silent and did not communicate that fact to her husband or any one for nearly a year thereafter. We think the facts offered by the defense tended to support their theory, and they had a right to have them presented to and considered by the jury, as bearing upon the question whether the offense charged had been committed or not.

Medical witnesses were called to testify, that in their opinion intercourse, under the circumstances described by the complainant, was highly improbable if not impossible, and also to the pain and suffering the complainant would have experienced had such an act taken place. As already said, the defense is a difficult one to prove, no matter how innocent the accused may be, more especially where the parties have been in each other's company, and thus apparently an opportunity has been given to commit such an offense. The time the parties were together, the particular place, and the probabilities arising therefrom of their being caught in the act, their position and their opportunities while together,

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all or any of these may render it highly improbable, if not impossible, that such an offense was really committed. And although counsel in their argument might draw the same conclusion as a medical expert would from the facts proven, yet they are not bound to rely upon this, but may call competent parties to testify upon that subject.

To establish the fact that the prosecution was commenced within one year, the warrant issued by the magistrate was offered in evidence, but objected to: *first*, because it did not appear that the complaint referred to therein was in writing; and, *second*, that the warrant itself would not be evidence of the commencement, but would only be evidence when coupled with the examination and return of the magistrate. The evidence and return of the magistrate was afterwards offered in evidence, which disposed of the second objection. And as to the first, the statute does not require a complaint in writing. The issuing of the warrant in good faith, and delivery to an officer to execute, is a sufficient commencement, if it appears that the defendant was afterwards arrested upon that warrant and bound over for trial.

A question was raised that as but one offense was charged in the warrant no other offense could be set forth in the information. The defendant, by pleading to the information, waived any such question that he might have raised thereto.

Questions were also raised as to the charge of the court relative to the effect of good moral character, and some others which are not likely to arise again, under previous decisions of this court which seem to have been overlooked, and we do not consider it necessary therefore to discuss them.

The conviction should be set aside and a new trial granted, and directions given to the court below accordingly.

The other Justices concurred.

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George W. Ford v. John M. Loomis and others.

Equity pleading and practice: Proofs: Case made by the bill. No relief can be granted in equity on evidence establishing a case not made by the bill.

Fraud: Estoppel: Laches. Where a party has consented that the legal title to lands should by an absolute conveyance be passed over to another, or discovers that another has fraudulently obtained the legal title and put it in the market, he cannot stand by and see third parties acquire rights upon such apparent legal title and afterwards ask for relief which is purely equitable.

Heard October 15 and 19. Decided January 5.

Appeal in Chancery from Mason Circuit.

E. N. Fitch, William L. Mitchell and *Robert Rae*, for complainant.

Shubael F. White, T. J. Ramsdell and *Mariner, Smith & Ordway*, for defendants.

MARSTON, J:

There are two objections to granting the relief sought in this case: *First*, the bill sets up that upon the 5th day of April, 1859, an agreement was entered into by which complainant consented that a certain tax-title interest which Henry S. Durand then held in certain lands claimed by said Ford, and also certain personal property then owned by Ford, should be conveyed to Loomis and Ludington in trust; that they were to take all of said property, operate the mill upon said lands, manufacture lumber, and out of the proceeds thereof pay themselves the amount of a decree which they had against complainant, and which was a lien upon most of his real and personal property, less twenty thousand dollars which they agreed to deduct therefrom; second, pay themselves five thousand five hundred dollars which they had paid Durand, and also pay all other debts which complainant was then owing divers persons, and after making such

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payments and also paying themselves for all costs, trouble and expense they were to in so doing, that they should then redeliver and reconvey the balance of said property to complainant, and that upon this agreement being made, complainant consented to their taking possession.

Complainant's own testimony fails to show that any such trust agreement was then or at any time entered into. It tends to show, and such was the theory of complainant's counsel, that Durand's claim or interest under the tax deeds was that of a mortgagee; that Loomis and Ludington merely succeeded to his rights and held this property as mortgagees for the payment of their decree, less the twenty thousand dollars deducted therefrom, and for the amount paid by them to Durand, and to one Hannah, in order to obtain a release of a lien which he held upon a part of the property. Complainant's testimony does not, nor does any of the testimony, tend to show an assignment to Loomis and Ludington of this property in trust for the payment of all Ford's debts as set forth in the bill of complaint. It has been so often decided in this state that no relief can be given on evidence establishing a case not made by the bill, that a reference to the cases is unnecessary.

Second. While there are many circumstances in the case tending to support the theory that the conveyance was intended as a security only; that Durand had no knowledge of the execution of the deeds of November 16, 1858, by Ford, and that only his interest under the tax deeds, and in the lands therein described, was to pass, yet the testimony is not of that clear, explicit and unequivocal character that would warrant us at this late day in opening up such matters. Where a party has consented that the legal title should, by an absolute conveyance, be passed over to another, or discovers that another has fraudulently obtained the legal title, and put it in the market, he cannot stand by and see third parties acquire rights upon such apparent legal title, and ask for relief which is purely equitable. Whatever rights Ford originally may have had, have been

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cut off by his laches. A party must be prompt in communicating the fraud when discovered.—*Disbrow v. Jones, Har. Ch., 102; Street v. Dow, Id., 427; McLean v. Barton, Id., 279; De Armand v. Phillips, Walker's Ch., 186.*

The fraud, if any was perpetrated, was in recording the deeds of November 16, to Durand. Complainant discovered this the next day after they were recorded, viz.: April 12, 1859, and yet he took no steps whatever in the case until this bill was filed in 1873, but stood silently by while the property was being improved, by parties claiming to own it in fee, until it has now become very valuable, and third parties have acquired rights therein.

The decree of the court below, dismissing the bill, must be affirmed, with costs of both courts to defendants.

The other Justices concurred.

James Ludington and another v. George W. Ford and others.

Equity jurisprudence: Mistake: Proofs. It is essential to the granting of relief in equity on the ground of mistake, that it should be made to appear that there was an error on both sides, and the mistake alleged must be admitted or distinctly proved.

Heard October 15 and 19. Decided January 5.

Appeal in Chancery from Mason Circuit.

Shubael F. White and *Mariner, Smith & Ordway,* for complainants.

E. N. Fitch, William L. Mitchell and *Robert Rae,* for defendants.

MARSTON, J:

The bill in this case was filed to correct a mistake. It is

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claimed that at the time of the agreement of April 5, 1859, referred to in the case of *Ford v. Loomis, supra p. 121,* a certain description of land which was not embraced in the tax deeds to Durand, but which was embraced in the deeds from Ford to Durand of November 16, 1858, was by mistake omitted from the deed made by Durand to complainants.

In order for the complainants to obtain the relief sought, it must appear not only that there was an error on both sides, but the mistake must be admitted or distinctly proved. —*Tripp v. Hasceig, 20 Mich., 254; Case v. Peters, 20 Mich., 298.*

The complainants have wholly failed in establishing either of these propositions. We are rather of opinion, on the contrary, that the only lands contracted to be conveyed by Durand to the complainants were those described in the tax deeds. None others are embraced in the deed from Durand, and it refers to the tax deeds "for a more full and perfect description of the lands and premises herein and hereby conveyed."

The decree of the court below must be reversed, and the bill be dismissed, with costs of both courts to defendants.

The other Justices concurred.

Lucinda A. Robbins and another v. William B. Barron.

Statutory recovery for tax-liens: Subsequent tax sales. It is a complete defense to a claim for a recovery under the statute (*Comp. L. 1871,* § 1131) as for a lien for taxes, that the right of the claimant has been extinguished by subsequent tax sales.

Tax-titles: Township and school taxes: Board of supervisors. A tax deed given upon a sale which included township and school taxes is not rendered invalid by a showing that the board of supervisors did not direct

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any taxes for township or school purposes to be assessed in the township for that year.

Heard October 27. Decided January 5.

Error to St. Clair Circuit.

Atkinson & Atkinson, for plaintiffs in error.

George E. Wasey and *D. C. Holbrook,* for defendant in error.

COOLEY, CH. J:

Barron brought suit against the plaintiffs in error to recover a certain tract of land in the township of China, of which it is conceded Lucinda A. Robbins is owner, unless her title has been cut off by tax conveyances. Barron holds tax-titles for the years 1864, 1865 and 1866, and claimed to recover upon these. It was shown, however, that each of these titles was defective, and Barron then claimed to recover the amount of the legal taxes which were covered by the sales, and also the taxes for 1867, which he had paid without sale.

To defeat this claim the defendants put in evidence a subsequent tax conveyance made to John Atkinson for the taxes of 1869. If this last conveyance is valid, it would seem to be a complete answer to the claim of Barron; for there can be no ground for a recovery as for a lien for taxes if the right of the party has been extinguished by subsequent sales.

The circuit judge reached the conclusion that Atkinson's title was invalid. The ground of invalidity was, that the board of supervisors did not direct any taxes for township or school purposes to be assessed in the township of China for the year 1869, but that nevertheless township and school taxes were assessed for that year, and are included in the sum for which sale was made to Atkinson. In the absence of any such direction by the board of supervisors, the circuit judge was of the opinion that no township or school tax could lawfully be levied.

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We think this conclusion of the circuit judge erroneous. The board of supervisors do not originate township or school taxes, but they take the certificate of the township clerk of the several amounts which the proper authorities have voted for those purposes *(Comp. L. § 992)*, and direct the amounts specified, if they appear to be authorized by law, to be spread upon the tax-roll of the townships *(Ib., § 997)*. The supervisors have no discretion in the premises; they have only to see that the sums are authorized by law, and then the duty to give the proper direction is imperative. If they should wrongfully refuse to give it, they might be compelled by *mandamus* to do so. But we also think that if the township authorities should proceed to levy the taxes which had been lawfully voted, their action would be perfectly valid whether the proper direction had been given by the supervisors or not. A neglect or refusal by the board to perform its duty, when nothing was submitted to their judgment or discretion, could not deprive the township authorities of the right to levy taxes which had been duly voted by the competent town and school boards. The action of the supervisors is not, we apprehend, required to give the local officers power in the premises, but rather to insure the duty being surely and regularly performed. A similar question arose in *Alvord v. Collin, 20 Pick., 418*, in which the town assessors levied a state tax without having received the proper warrant directing them to do so; and their action was held to be entirely valid. There is no claim, as we understand it, that any excessive or illegal tax was levied for the year in question, unless the defect we have considered rendered the levy illegal, and we are clear it did not.

The judgment must be reversed, with costs, and a new trial ordered.

Other questions were discussed by counsel, but we have not considered them, as the case in the court below turned upon this. Our statutes now undertake to give a purchaser at a tax-sale which proves defective a lien for the money paid; but when they come to be administered in a case

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like this, where there are successive purchases by different persons, the questions are sufficiently difficult to make it wise to defer any definite opinions until all the facts are before us.

The other Justices concurred.

John Q. Beam v. Reuben Macomber; and Reuben Macomber v. John Q. Beam.

Arbitration: Awards: Fraud: Mistake: Equity jurisprudence. It is not competent to open an award made by judges selected by the parties themselves for any small or slight occasion; yet fraud and mistake may furnish grounds for equitable interference.

Partners: Arbitration: Good faith: Concealment: Fraud. In the case of an arbitration of partnership matters where each partner has kept account of his own matters, each is bound in good faith to lay before the arbitrators his whole knowledge of the facts, and any willful omission so to do is tantamount to fraud.

Arbitration: Awards: Evidence. It requires some strong evidence to impeach a result on which the arbitrators heard the parties and exercised their judgment, and where there was no concealment of facts; something more than a mere showing by an accountant that the statement of account presented to the arbitrators by the opposite party was in a form not according with the rules of book-keeping, where it is apparent that the statement, as made out, could not mislead if compared with other papers in the case to which it must be presumed all the parties looked for information.

Fraud: Concealment: Confidential relations. Intentional concealment between persons in confidential relations is legal fraud.

Heard October 28. Decided January 5.

Appeals in Chancery from Kalamazoo Circuit; bill and cross bill.

Edwards & Sherwood, for Beam.

Severens, Boudeman & Turner, for Macomber.

CAMPBELL, J:

The present controversy arises out of an arbitration of

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partnership matters, whereby an award was made against Beam in favor of Macomber of nine hundred and ninety-two dollars and thirty-four cents. The parties had been engaged in buying and selling live stock, and upon a difference in their final accounting, they referred their matters to A. C. Prutzman, C. F. Wheeler and E. H. Lothrop, each depositing a note of one thousand two hundred dollars, the prevailing party to receive the note of the other, with such endorsements as should reduce it to the real balance. The arbitrators, having found the amount of nine hundred and ninety-two dollars and thirty-four cents to be due Macomber from Beam, endorsed down his note to that sum and gave it to Macomber, June 23d, 1870. Four days thereafter Macomber sued it in attachment against Beam. In February, 1871, Beam filed his bill to have allowed him a sum of one thousand two hundred dollars paid for the firm but accidentally omitted from his statement submitted to the arbitrators, and never acted on by them, though alleged to have been known to Macomber and not revealed by him. Various proceedings were had before answer, which need not be referred to. The answer, which was not sworn to, denies the error, but avers two errors against Macomber, which he claims to have recently discovered,—one in an omission by Beam to charge himself with seven hundred dollars, part of receipts from sales of hogs, September 23, 1869; and one of one thousand three hundred dollars, from sales on October 20, 1869. A cross-bill, not sworn to, sets up the same facts, and prays a correction of the award.

Proofs were taken, and all the arbitrators were sworn on behalf of Beam, who was also a witness. Macomber introduced no evidence, except from an accountant to prove the proper mode of making debit and credit entries. He was not sworn himself. Both bills were dismissed, and both parties appeal.

The first question presented is, whether any case is made for disturbing the award.

It is not competent to open an award made by judges

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selected by the parties themselves for any small or slight occasion. Parties having selected them and trusted to their discretion must abide by their decision unless very good reason can be shown to the contrary. But on the other hand, the mere fact that arbitrators have acted, does not prevent courts from inquiring to ascertain whether by fraud or accident they have been prevented from making such an award as they might or would have made on a fair and full showing; and equities may exist which will render it just and proper to relieve against the defects which are found to arise from their omissions, for which the complaining party is not in fault. Fraud and mistake may furnish grounds for equitable interference.—*Bulkley v. Starr, 2 Day, 553; Van Cortlandt v. Underhill, 17 J. R., 405; Charter v. Trevelyan, 11 Cl. & Finn., 714; Champion v. Wenham, Ambler, 245; Hutchinson v. Shepperton, 13 Q. B., 955; Boston Water Power Co. v. Gray, 6 Met., 131; In re Dare Valley Railway Co., L. R., 6 Eq., 429.*

In *Champion v. Wenham, Ambler, 245,* it was held the whole award need not be disturbed where the matter complained of can be discriminated and settled by itself. And such seems to be the good sense of the matter.

The present case being one where each of the partners kept account of his own matters, each was bound in good faith to lay before the arbitrators his whole knowledge of the facts, and any willful omission to do this would have been fraud. The failure to have all proper evidence laid before them could hardly fail to have arisen from either fraud or mistake of one or both of the parties.

The items set up by Macomber, if correctly claimed by him to have been omitted in the accounting, would have changed the balances very considerably. Their combined amount is two thousand dollars, and the allowance of either of them would have required the arbitrators to make an award against Beam beyond the face of the one thousand two hundred dollar note deposited; and the allowance of both would have about doubled the award.

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The fact of this great excess is of itself enough to require caution in examining Macomber's claim, for it is evident the differences which the parties found in their private accounting, and which led them to arbitrate, must have been such as did not contemplate a balance of more than one thousand two hundred dollars due to either, and no attempt has been made to show any concealment of these items at that time.

Upon examining the record and proofs we find abundant evidence that the items out of which the seven hundred dollar claim arises were submitted to the arbitrators, and that they heard the parties, and upon investigation changed Beam's statement by adding to it a charge against him of a further sum than he had credited. He swears, and the other testimony bears him out in it, that the additional charge grew out of a dispute which they examined into. There is nothing to show the arbitrators had not full means of knowledge, and Beam swears positively that he credited the whole money in controversy except the sum added by them against him. It also appears from the testimony of one of the arbitrators, that while Macomber found fault afterwards with the disallowance of the one thousand three hundred dollar item, he said nothing to him about this. Under all these circumstances we think there is nothing to show any mistake or misconduct of the arbitrators, or any oversight. And as Macomber has not seen fit to give his own testimony or show his own vouchers or accounts, it must be presumed there is no ground of complaint on this score.

The one thousand three hundred dollar item was also brought before the arbitrators and passed upon, and we have no reason to suppose there was any mistake here, for it was in the minds of all the parties, and it is not probable that any one of intelligence could have passed by such a mistake as is set up in regard to it. This sum, as well as other items, appears in Beam's statement in a form not according with the rules of book-keeping, but nevertheless in such a way as to lead to no difficulty, if compared with the sales

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accounts, to which it must be presumed all the parties looked for information. Beam received two thousand three hundred and eighteen dollars and twenty cents, on the 22d of October, 1869, of which he retained one thousand and eighteen dollars and twenty cents, and paid to Macomber one thousand three hundred dollars. He charged himself with the former sum and the company with the latter, and made no credit. There were no partnership books, and these charges, if they stood alone, would represent the transaction in the same way as if he had simply charged the difference between what he and Macomber received, leaving each to retain his own share of two thousand and thirty-six dollars and forty cents as divided. No injustice could be done, unless Macomber also charged himself a second time with the same amount, and was, in consequence, twice charged by the arbitrators. Such a mistake would be so obvious it could hardly escape attention. In the statement on which the arbitrators appear to have made their final figuring, the account of Macomber's dealings charges him only with such moneys as he received from his own sales, which would not include this. If this is so, and we find nothing which leads us to doubt it, then if there is any error at all, it is against Beam, for charging to the company what was chargeable to Macomber individually. In regard to these two items set forth in his cross-bill, Macomber was the complaining party on the record, and had the burden of proof. He has made no attempt to enlighten the court by his own testimony, or that of others, and has not produced the papers and vouchers which he must have had the means of producing. We have nowhere the sanction of his oath, either positively or on information and belief, as to any error against him, and there are some things which appear to indicate that the award, apart from Beam's present claim, might have been too large instead of too small. He contented himself with swearing a witness upon the proper method of entering items of debit and credit, and has not shown any thing to impeach the actual result. It certainly requires

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some strong evidence to impeach a result on which the arbitrators heard the parties and exercised their judgment, and where there was no concealment of facts. The arbitrators have not discovered any error themselves, and do not admit any. Beam denies any error, and gives good reasons for denying any, and the exhibit of the arbitrators' reckoning shows none that we have discovered. Macomber made no effort to have any correction made until he filed his answer and cross-bill, eighteen months after the original bill was filed.

We think Macomber's case entirely fails, and that the award is not one which has done him injustice. It is not necessary to consider the question of estoppel urged against him from his prosecution of the Beam note, since he has not proved any defect to his prejudice.

As to the twelve hundred dollars which the bill was filed to have credited to Beam, the testimony is full, from arbitrators and witnesses, that it was never brought to the attention of any one during the arbitration. It escaped the attention both of Beam and of Mr. Cole, who drew off his account, and there is no doubt he made the payment as he claims he did. It is also evident that Macomber knew it and concealed his knowledge. He admitted as much after the award, to Mr. Wheeler and to Beam. He cannot, therefore, complain that he has been misled or damnified by Beam's silence or neglect. It was as much his duty as it was Beam's to show all that he knew of the true condition of the accounts, and intentional concealment is legal fraud between persons in such confidential relations.

Having failed to give his own explanation or to contradict Beam in any particular, we must accept the complainant's theory of the transaction, and hold that he has, without fault of his own, been deprived of a credit which he should have received. The original bill does not ask relief against the award except as to this item, and we have not any adequate means of correcting it in any other respect. Treating this as a separate item, and as a partnership debt

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of which Beam was bound to bear one half, he is entitled to a credit on his note to Macomber of six hundred dollars, and interest from December 16, 1869, to the date of the note, being in all six hundred and twenty dollars and forty-two cents, leaving the note reduced from nine hundred and ninety-two dollars and thirty-four cents to three hundred and seventy-one dollars and ninety-two cents.

The decree of the circuit court dismissing the cross bill must be affirmed, the decree dismissing the original bill must be reversed, and a new decree entered allowing to Beam the correction of the award by deducting such credit from the note and endorsing the note down to three hundred and seventy-one dollars and ninety-two cents as of its date, and restraining the collection of the balance, and granting costs of both courts to Beam, against Macomber.

The other Justices concurred.

The Fort Wayne, Jackson & Saginaw Railroad Company v. Juliza A. Gildersleeve.

Employes: Risks incident to the business. Employes are held bound to bear the consequences of all the ordinary risks incident to their employment.

Master and servant: Implements of improper construction: Negligence. A servant has a right to repose confidence in the prudence and caution of his employer and to rely upon his not putting him in charge of implements which, from improper construction or other causes, are so dangerous that a prudent man would not make use of them.

Master and servant: Dangerous implements: Risks incident to the employment. Whether where one undertakes the employment, or continues in it without protest, notwithstanding he knows that by so doing he is and will be required to make use of an implement of improper construction and dangerous, the liability to injury therefrom is to be considered as an exception to the rule as to risks incident to the employment:—*Quære?*

Employers: Employes: Implements: Prudence. An employer cannot properly be held to be under so strict obligation to his servants as to be required under all circumstances to make use only of the safest known appliances and instruments, and to be held responsible for any failure to

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discard what is not such and to supply its place with something better and safer.

Railroads: Cars: Coupling: Negligence: Servants. A railroad company is held not to be guilty of such negligence in making use in its trains of an old mail car which was lower than the others, as to be liable to its servant who knowingly incurred the risk, for an injury resulting from the coupling of such old car with another, though the danger be greater than with cars of equal height.

Evidence: Statements: Agency: Negligence. A statement made by the mechanic in charge of the shops where the defendant procured its repairs to be made, in reply to complaints made to him of the car in question, that it ought not to be made use of for coupling with the coupler on the other cars, is not evidence of assurances by defendant that its use would be discontinued, and has no tendency to make out a case of culpable negligence on the part of the defendant towards its servants.

Heard October 29. Decided January 5.

Error to Jackson Circuit.

John D. Conely, for plaintiff in error.

F. & R. Livermore and *G. T. Gridley*, for defendant in error, cited: *Davis v. D. & M. R. R. Co., 20 Mich., 126; Laning v. N. Y. C. R. R. Co., 49 N. Y., 521; Flike v. B. & A. R. R. Co., 53 N. Y., 549; Gilman v. Eastern R. R. Co., 10 Allen, 233; 13 Allen, 433; Huddleston v. Lowell Machine Shop, 106 Mass., 282.*

COOLEY, CH. J:

The plaintiff, as administratrix, has recovered against the defendant a judgment for damages occasioned by the killing of the intestate, who was a servant in defendant's employ. The accident occurred while the intestate was engaged in coupling two cars, one of which was lower than the other, rendering the act of coupling peculiarly difficult and dangerous. The gravamen of the complaint is, the negligence of defendant in making use of this low car, and subjecting its servants to the consequent risks. It is not claimed that the difficulty and danger were unknown to the intestate; on the contrary, much evidence was given on the part of the plaintiff to show that the danger was well understood by the

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intestate, and that the car had a bad reputation among the employés of defendant. What the bad reputation was for does not very distinctly appear, though the evidence tends to show that it was rather because its construction,—it being an old mail car,—made it inconvenient for use, than for any other reason. This, however, is not very material. No question is made but that any difficulty that existed in coupling the car was understood by the intestate.

The question in the record is, whether there was any evidence tending to establish a claim against the defendant. On the argument it has been assumed on both sides that the rule of law which leaves the servant to bear the consequences of all the ordinary risks incident to his employment ought to remain undisturbed. Both parties rely upon the case of *Davis v. Detroit & Milwaukee R. R. Co., 20 Mich., 105*, in which that rule was examined and approved, as a rule reasonable in itself as it affected the particular relation of employer and employed, and as being also an important rule of public policy in its tendency to ensure caution and vigilance on the part of persons employed.

The plaintiff relies upon exceptions to that rule and claims to recover on the ground, either that the defendant was guilty of a breach of duty to its employés in making use of a dangerous vehicle, or that it was culpable in not discontinuing its use in accordance with what were equivalent to assurances to the persons employed that the car should be replaced by another. If the evidence tends to show a breach of duty in either of these particulars, it is insisted there was a case for the jury based upon the negligence of the employer, the risks of which the employed is never understood to assume.

Undoubtedly a servant has a right to repose confidence in the prudence and caution of his employer, and to rely upon his not putting him in charge of implements which, from improper construction or other cause, are so dangerous that a prudent man would not make use of them. If the

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servant is injured in consequence of this confidence being abused, he ought to be remunerated. But where the difficulties in the case are fully known to him, and he undertakes the employment, or continues in it without protest, and makes use of the implement without there being in the case any thing in the nature of compulsion, it is a serious question whether his case is within the reason of recognized exceptions to the general rule. This, however, is a suggestion which will be passed over without discussion at this time.

The car which was the cause of the injury in this case was not in itself dangerous, or unfit for use. In coupling it with other cars peculiar caution was requisite, making it more liable to cause injury than would be a car of more modern construction. Its use, therefore, made the employment more dangerous than it otherwise would be. In that particular the case may be compared to that of a farmer, who, with knowledge on the part of himself and those in his employ, that a horse he has had in use is disposed to be fractious and unmanageable, continues nevertheless to use him in his business. It may be compared to that of the merchant who continues to make use of a fluid for light, when something else which is within his reach has been demonstrated by experience to be safer. So far as we can perceive, the case of the manfacturer would not be different in principle, who should continue the use of a building which, in the event of a conflagration, would subject his employés to greater risks than would one of different construction. Comparisons innumerable might be made with this case in all the avocations of life.

Now any rule on this subject must be a general rule, and not one to be applied to railroad companies alone. It will be perceived that the risk in the case was such as would affect only the person employed, and that whatever duty was imposed by the circumstances upon any one, could have had reference only to such persons. The case is consequently

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divested of any question except such as would concern the relation of master and servant, and the same rule would govern the case that would govern were the question to arise between the farmer, the mechanic, or the manufacturer, and the persons in his employ. And treating it as a question of such broad application, we do not perceive any ground upon which the plaintiff's case can safely be planted, which comes short of this: that the employer is under obligation to his servants under all circumstances to make use of the safest known appliances and instruments, and is responsible for any failure to discard what is not such, and to supply its place with something safer.

Any doctrine so far reaching as this would manifestly be destructive of the general rule, and would almost make the employer the guarantor of his servant's safety in his employ. But under any less serious responsibility, it would be impossible to sustain a judgment against this defendant, upon the sole ground of a failure to discontinue the use of this car. In any light in which the question can be viewed, no breach of duty can be charged against the defendant, unless it be the duty to make the employment as safe for the persons employed as was possible. Certainly, in making use of this car no confidence which was reposed in the prudence and caution of the employer has been betrayed. The difficulties, as has already been stated, were fully known and understood, and the intestate voluntarily continued to encounter the risks.

On the other ground we find it equally difficult to discover what there was to go to the jury. It was not shown that any complaint was made to the company, or its superintendent, that there was danger in the use of the car, or that any assurances were given that the use would be discontinued. There is no ground in the evidence for a suggestion that the intestate continued in the business because of assurances from any person in authority, that this car would be taken off. There is some testimony of complaint

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made to the mechanic in charge of the Michigan Central car shops at Jackson, where the defendant had its repairs made, and of a reply made by him, that the car ought not to be made use of for coupling with the coupler on the other cars; but obviously there was nothing in this to charge the defendant with any assurances, or to affect the case in any manner.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

The Liverpool, London & Globe Insurance Company v. John A. S. Verdier and another.

Fire insurance: Contribution: Averaging the loss: Subsisting policy. In a contest as to the adjustment of the proportion of a loss by fire, under a policy providing for averaging the loss, which one of several insurers of a firm should bear, a policy in another company, taken in the individual name of one of the partners prior to the formation of the partnership, and never assigned to the firm, though by the terms of the partnership agreement all insurance was to be, but which was shown to have been treated and dealt with, both by said firm and by the company issuing it, as a subsisting policy in full force in favor of the firm, is held to be entitled to be drawn into the adjustment and to be chargeable with its proportion of the loss, and to that extent to reduce the amount recoverable upon the policy in suit.

Heard November 2. Decided January 5.

Error to Kent Circuit.

Hughes, O'Brien & Smiley, for plaintiff in error.

Norris, Blair & Stone, for defendants in error.

GRAVES, J:

The defendants in error recovered in the court below on

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a fire policy issued to them in their firm name of Verdier & Brown by the company. The risk covered by the policy was from the 15th day of May, 1874, until the 15th day of May, 1875, and was taken on Verdier & Brown's "stock of hardware and gas fixtures, consisting of stoves, shelf goods, tinware, furnaces, pumps, mantels, plumbing materials, gas fixtures, gas pipes and such other goods usually kept on sale by them as dealers in hardware and gas-fitters' goods, contained in three-story brick, tin roof building, situated on the east side of Canal street, No. 102, Grand Rapids, Mich." The amount of the risk was three thousand dollars, but the policy permitted other concurrent insurance of nine thousand dollars, and in fact there was other insurance in the association called the Underwriters, and also in the Merchants' Insurance Company, and making with that taken by the plaintiffs in error eight thousand dollars. That of the Merchants' company, however, included a small sum upon tools. The loss happened on the 4th of June, 1874, but was only partial. It amounted to six thousand eight hundred and eighteen dollars and twenty cents.

The plaintiff in error claimed that besides these insurances, there was one existing when the fire happened, of three thousand dollars, issued by the Home Insurance Company, and which ought to be taken into account in calculating the amount or share of the entire loss to be borne by them. This position being controverted by the assured, the plaintiffs in error, on the 15th of August, 1874, and before suit, tendered one thousand nine hundred and three dollars and seventy-six cents, as the sum they were liable for on the basis of the Home Company's policy being reckoned amongst those to be considered in fixing the sum called for from plaintiffs in error under the agreement in their policy. This was several hundred dollars less than they were bound to pay if the policy of the Home Insurance Company was excluded. The defendants in error continued in their opinion, and finally claimed upon the trial that the Home policy was not to be considered at all in fixing the amount lawfully

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payable by plaintiffs in error under the agreement in their policy, and the court below, being of that opinion, charged accordingly. And the question now is, whether it appears by this record that the court erred in so ruling. If it did, the recovery was excessive; if otherwise, it was not. To decide the point we must be governed by the record. The policy in suit is set forth, and by the seventh article the parties contracted as follows: "In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, without reference to the dates of the different policies, or their invalidity from want of notice of this or other insurance, or from the violation of any of their conditions, or the insolvency of any or all the other insurance companies. And it is hereby declared and agreed that in case of the assured holding any other policy in this or any other company on the property insured, subject to the conditions of average, this policy shall be subject to average in like manner."

It appeared in evidence that the Home Insurance Company of the city of New York insured by their policy of May 1st, 1873, the defendant in error, John A. S. Verdier, in the sum of three thousand dollars for the term of one year, "on his stock of hardware, tin, iron, stoves and such other articles as are usually kept on sale by him as a hardware and Yankee-notion dealer, contained in three-story brick building, situate on the east side of Canal street, No. 82, Grand Rapids, Mich." It also appeared that No. 82 was afterwards changed to No. 102 by city ordinance. The place was therefore identical with that specified in the policy issued by plaintiff in error.

Mr. Verdier being sworn, it appeared from his evidence, that for some time prior to the fire he had carried on the business mentioned in this policy, and that about a month before it he took Mr. Brown in as partner, and that it was

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then agreed between them that all fire policies should be transferred to the firm, that the policy issued by the Merchants' Company was transferred accordingly, but the policy issued by the Home Company was not assigned, for the reason that on seeking for the agent in order to accomplish that object, it was found that he was not at Grand Rapids, and that the term of the Home policy expired on the first of May, and the premium for renewal was not paid until the day of the fire and just after that event, but was then paid to a clerk of the agent. A renewal receipt was put in evidence, which purported to bear date May 1st, 1874, and to renew the policy for a year from that time at the rate of one and a quarter per cent. It also appeared from the evidence of Mr. Verdier that this policy covered the goods in the store before Brown united with him, and that the adjustment of loss was begun four or five days after the fire and was concluded about two weeks after, and that the agents of plaintiffs in error, of the Underwriters' Association, of the Merchants' Company, and also of the Home Company, participated in it. It seems a necessary inference likewise, that the defendants in error did also.

It further appeared from Mr. Verdier's evidence, that after the loss he assigned the policy of the Home Company to the Hanover Company of New York, being one of the association styled Underwriters, and received therefor the amount he claimed, leaving out the Home Company, or in other words, as subsequently stated by him, that he received from them the amount the loss would bear to the Home Company, provided they had to pay, and that they settled with him on the basis that the Home did not pay any thing.

This evidence was in no way controverted, and it is substantially all we have in the record; and standing as it does, it shows that the defendants in error considered the Home policy in force and operative as an insurance on the stock when the agreement was made between them for an assignment by Verdier to the firm, and when the premium for renewal was paid after the fire, and it also serves to show

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that the Home Company so considered it when they took part in the adjustment of loss. We have the further fact of an assignment to the Hanover Company, of the Underwriters' Association, and the circumstance that the Home Company does not appear to have surrendered or returned the renewal premiums, or to have questioned in the least the subsistence of the policy, or the amplitude of its application to the firm stock. As between the defendants in error, the agreement to assign conveyed the equitable right and title to the firm, and the proof given by Mr. Verdier himself is strong to show that the company acquiesced, and were not minded to object that no formal assignment had been made. If the defendants in error and the Home Company mutually assented to the continuance of the Home policy, and its application to the firm stock, as it stood up to the time of the assignment to the Hanover Company, as the uncontradicted evidence is very strong to show, we do not see upon what ground the defendants in error can maintain the opposite to defeat the operation of the seventh article of the policy in suit. The defendants in error and the Home Company were certainly competent to give effect to the arrangement between Verdier and Brown for a transfer, and to keep the policy in life and allow its application in the broadest manner; and all the evidence is very cogent to show that they did so. Notwithstanding the old stock originally insured as the individual insurable interest of Mr. Verdier had become firm stock, still the Home Company received a renewal premium and kept it. We say kept it, because there is no hint of its return, and if it had been returned Mr. Verdier must have known it, and have felt the importance of stating it. He not only did not intimate any thing of the kind, but proved the assignment of the policy as a subsisting one; and still further, that the assignment was made in the way of working out an adjustment of a firm transaction; and in assigning in this way the defendants in error implied by their conduct, that in truth the policy was a firm asset. Then again, the joining of the Home Com-

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pany in the adjustment, and the want of objection on their part, are agreeing circumstances with the others, to show that the company and defendants in error were in actual concurrence, that the policy was a living one of defendants in error, and an insurance upon their stock. The conduct of the parties will allow no other explanation unless we go out of the records.

It will hardly do to say that the company, by their agents, were working and spending time in the adjustment of a loss in which they had no interest, or that the conduct of the company's agents, in view of the attitude of defendants in error, or the acquiescence of the company in the claims or assumptions of the latter, may now be set aside or ignored by defendants in error. Neither is it quite admissible for defendants in error to now contradict the whole tenor of their dealings between themselves, and with the Home Company and the other companies, in order to escape from an article in their agreement with plaintiff in error. There was clear evidence to show a contract relation between the defendants in error and the Home Company, within the meaning and operation of the seventh article of the policy in suit. As the court below held otherwise, it erred.

The judgment should be reversed, with costs, and a new trial ordered.

The other Justices concurred.

The Westchester Fire Insurance Company v. James D. Earle and another.

Additional insurance: Policy: Consent: Definiteness: Construction. Where an insurance policy which contains a proviso that additional insurance procured without the consent of the company endorsed thereon should annul the policy, also contains the clause: "$3,000 other insurance per-

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mitted," it furnishes its own rule of construction as to the definiteness meant to be required in the consent to future insurance.

Insurance policies: Conditions: Forfeitures: Construction. All those conditions and provisions in insurance policies which involve forfeitures are to be construed strictly.

Insurance policy: Oral contracts: Statute of frauds. Except where prevented by the operation of the statute of frauds, or some other equivalent prohibition, a policy of insurance may be made or changed by parol; and the fact that a policy is written does not prevent its change by subsequent parol agreement, or its enlargement or continuance.

Contracts,—in writing—by parol. A written bargain is of no higher legal degree than a parol one, and either may vary or discharge the other; and one who has agreed that he will only contract by writing in a certain way, does not thereby preclude himself from making a parol bargain to change it; and there is no more force in an agreement in writing not to agree by parol, than in a parol agreement not to agree in writing.

Insurance: Policy: Additional insurance: Condition: Forfeiture: Consent: Estoppel: Agents. Notwithstanding an insurance policy contains a proviso against additional insurance except upon "the consent of this company written hereon," and provides also that "the use of general terms, or any thing less than a distinct specific agreement, clearly expressed and endorsed upon this policy, shall not be construed as a waiver of any printed or written condition or restriction therein," yet where an agent with whom all the dealings were had, and whose authority is not shown to have been restricted in any way, has so acted as to have bound himself by way of estoppel not to dispute the validity of certain additional insurance on the point of consent, the company will be likewise bound.

Insurance: Agency: Additional insurance: Consent: Estoppel: Forfeiture: Condition. Where an agent having authority to consent on behalf of the company to additional insurance, and with whom the original dealing was had, has first negotiated to get further insurance placed in some company which he represented, and conveyed the impression that consent thereto in writing was not necessary, and afterwards, when informed of the procuring of an additional policy elsewhere, has made no objection, then or at any other time, nor offered any suggestion that any breach of condition of the original policy had been created or would be relied upon, this would make out a plain case of estoppel as to the agent, and would also preclude the company from setting up such condition in avoidance of their policy.

Evidence: Res gestæ. Evidence concerning the purchase of the additional machinery, which was the occasion for the new insurance, is held to have been admissible as part of the *res gestæ*.

Requests to charge. Where a request to charge is not presented separately, but is coupled with another which is erroneous, the refusal of the whole is not error, though the former, standing alone, was proper to be given.

Charge to the jury: Testimony of one witness only. The court in charging the jury is not bound on request to present the case to them for consideration on the evidence of one of the witnesses only, or to put to them any proposition which will confine their attention to one witness more than another; while this may sometimes be done in a plain case without error, it is not error to refuse to do it.

Heard November 2. Decided January 5.

Error to Kent Circuit.

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Joslin & Kennedy, for plaintiff in error, that a waiver of the condition in the policy could not be established except as provided by the policy, cited: *Barrett v. U. M. F. Ins. Co., 7 Cush., 175; 9 Cush., 471; Worcester Bank v. Hartford Fire Ins. Co., 11 Cush., 265; Conway Tool Co. v. Hudson R. Ins. Co., 12 Cush., 144; Kimball v. Howard Fire Ins. Co., 8 Gray, 33; Parks v. General Ins. Ass. Co., 5 Pick., 34; Watson v. Emet, 1 Taunt., 115; Flinn v. Tobin, Mood. & Walk., 367; Meres v. Ansell, 3 Wils., 275; Holmes v. C. M. F. Ins. Co., 10 Met., 211; Whitney v. Haven, 13 Mass., 172; Carpenter v. P. W. Ins. Co., 16 Pet., 495; Jennings v. C. C. M. Ins. Co., 2 Denio, 75; Higginson v. Dale, 13 Mass., 96; Cockerill v. Cin. Ins. Co., 16 Ohio, 149; Gardner v. Piscat. Ins. Co., 38 Me., 439; Trask v. S. F. & M. Ins. Co., 29 Penn. St., 198.*

There can be no estoppel *in pais* in behalf of one having full knowledge of all the facts. It applies only to facts.—*Baker v. U. L. Ins. Co., 43 N. Y., 283; Lawrence v. Brown, 5 N. Y., 394; W. Ins. Co., v. Riker, 10 Mich., 279; S. Ins. Co. v. Fay, 22 Mich., 467; N. Y. C. Ins. Co. v. Watson, 23 Mich., 486; Am. Ins. Co. v. Gilbert, 27 Mich., 429; Van Buren v. St. J. F. Ins. Co., 28 Mich., 398.*

When the authority of an agent is limited by the contract which he makes with third parties, they cannot be protected by the plea that they had no notice of this limitation, or that the principal would be bound by the acts of the agent in excess of his authority.—*22 Mich., 471; 6 Gray, 173; 17 Mass., 29; Pars. on Cont., 5th Ed., 59, 61; Story on Agency, §§ 127, 133; 22 Wend., 260.*

Notice to an agent is notice to the principal only when the agent was acting within the scope of his authority.—*Spandone v. Mansel, 2 Daly, 263; Pendar v. Am. M. Ins. Co., 12 Cush., 469; Hale v. M. F. Ins. Co., 6*

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Gray, 173; Sands v. Hill, 42 Barb., 659; Bank v. Lewis, 22 Pick., 243; Ang. on Corp., last ed., 312; Adam's Eq., 322.

Norris, Blair & Stone, for defendants in error. It is the decided tendency of the modern cases to hold that if notice be duly given to the company or its agent, of the additional insurance, and no objection is made, the company will be estopped from insisting on a forfeiture of the policy because their consent was not endorsed as literally required by the stipulation.—*May on Ins., § 370, et seq.; Thompson v. St. Louis Mut. L. Ins. Co., 2 Ins. L. J., 422; Heayward v. National Ins. Co., Ibid., 503; Horwitz v. E. M. Ins. Co., 40 Mo., 55; 42 Mo., 456; 43 Mo., 148; 47 Mo., 435; Viele v. Germania Ins. Co., 26 Iowa, 55; Walsh v. Ætna Life Ins. Co., 8 Bush, 133; Peek v. New London, 22 Conn., 575; Hutton v. Beacon Ins. Co., 16 U. C., (Q B.), 316; National F. Ins. Co. v. Crane, 16 Md., 260;* and none of the Michigan decisions conflict with this rule, as applied to the facts of this case as found by the jury.—See *12 Mich., 124, 202; 16 Mich., 380; 19 Mich., 451; 21 Mich., 246; 22 Mich., 146, 473; 23 Mich., 487; 24 Mich., 117; 28 Mich., 174.*

It must affirmatively appear in the record that the condition has been violated.—See *Wash. F. Ins. Co. v. Davidson, 30 Md., 91.*

CAMPBELL, J:

This case, which has been in this court once before, is now presented under a somewhat different state of facts.

On the 8th of March, 1872, the Westchester Fire Insurance Company insured Earle & Reynolds to the amount of two thousand dollars on their fixed and movable machinery, situated in their woolen manufactory. A fire destroyed the

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insured property in January, 1873, during the original term of the insurance.

The policy contained two clauses which are regarded as important in this suit. One was: "If the assured shall have, or shall hereafter make any other insurance upon the property hereby insured, or any part thereof, without the consent of this company written hereon, then, and in every such case, this policy shall be void."

The other was: "The use of general terms, or any thing less than a distinct specific agreement, clearly expressed and endorsed upon this policy, shall not be construed as a waiver of any printed or written condition or restriction therein."

There was inserted in the written part of the policy "$3,000 other insurance permitted." Insurance was effected, at or about the same time, in other companies, for the aggregate sum of three thousand dollars.

In May, 1872, additional machinery, being knitting machinery of the value of three thousand dollars, was put in the factory.

In June, 1872, the firm procured two thousand five hundred dollars further insurance in the American Central Insurance Company upon the entire machinery, new and old; and this was not preceded or followed by written consent of the Westchester Fire Insurance Company. This additional insurance is relied upon as a defense to the suit now before us, it being claimed that the original insurance policy was made void by the additional insurance, because the latter was not formally consented to.

It is claimed by Earle & Reynolds that the conduct of Mr. Atwater, the agent of the Westchester Fire Insurance Company, was such as to leave the policy in force, in spite of the failure to have consent for further insurance endorsed.

Upon most of the facts outside of the writings there is a conflict of testimony. Earle and Reynolds were sworn in their own behalf, and Atwater for the Westchester Fire Insurance Company; and the finding of the jury is in

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accordance with the testimony of the insured. The errors assigned refer to the rulings.

It is to be remarked that the consent actually inserted in the policy did not refer to insurance in particular companies, but allowed the three thousand dollars further insurance to be obtained any where. It must be assumed, therefore, that it was not designed to require consent to future insurance to be any more definite. In this respect the policy furnishes its own rule of construction.

It is also to be remarked that the circuit court charged the jury, at the request of the defendant below, that the mere fact that the agent Atwater did not dissent upon receiving knowledge or notice of the intention of plaintiffs below, would create no waiver or estoppel; and further, that it was not the duty of the insurance company, after such notice, to notify the insured that the additional insurance avoided the policy; and further, that the policy contemplated notice of the proposed additional insurance in advance; and that knowledge of the additional insurance would amount to no more than knowledge that the insured had voluntarily terminated the policy.

The court refused to charge that Atwater had no authority to waive the condition, or make assurances that it could be waived, except in the manner provided in the policy; or to charge that there were no sufficient facts proved to constitute a waiver or estoppel.

The charges given, under which the recovery was had, were in substance as follows: that in order to escape the condition the insured must show that the agent had done some act, or made some representation, or remained silent when he ought to have spoken, and thereby misled the insured, and induced them to rely on the policy to their injury, and by causing them to believe the policy remained in force, prevented their seeking other insurance; and that such conduct would preclude the company from setting up the condition; and that notice to the agent was notice to the company.

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All the dealings in evidence were with Atwater, the agent at Grand Rapids, where the property was situated; and no other representative of the company took any steps before the fire.

The testimony for the insured went to show that the property insured was worth about twice the amount of the whole insurance. It further showed that the first application for further insurance was to Atwater, who said he would try and get it placed in some company of which he was agent, and that after waiting some time without his doing so, the risk was placed elsewhere. It is sworn that in this conversation Atwater said it would make no difference to the company, but did not say in so many words that it need not be consented to in writing, though that inference was drawn from all that took place. There seems also to have been some talk about terms, as that appears to have been one of the reasons for preferring the other insurers.

Immediately after the new insurance was obtained, Earle and Reynolds (according to their testimony) wrote a letter to Atwater, informing him of the precise amount of the additional insurance on the machinery, and stating in detail all the policies which they held, including the one in controversy, amounting with the new policy to seven thousand five hundred dollars, which they said was all they cared to insure on the machinery. In the same letter they asked for terms of insurance on the stock in the building. This letter is sworn to have been left in Atwater's office.

Very shortly thereafter Earle met Atwater, who at once referred to the new insurance, and asked why it had been placed with the other insurers and not with him, and was told it was because it was got on cheaper terms. In this and in following conversations about the same time, no objection was made, and no suggestion offered, that any breach of condition had been created, or would be relied upon. Atwater said he considered the risk of seven thousand five hundred dollars on the machinery then owned, as equivalent to the original five thousand dollars on what was owned before.

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No further objection was ever made, and proof of loss was made as required, to the adjusters.

Upon this testimony, which the jury had the right to believe, and which they appear to have believed, it is beyond question that Earle and Reynolds relied, and had reason to rely on the validity of their insurance, and to assume that nothing had been done to destroy it. If Atwater himself had been the insurer, it would be difficult to find a plainer case of estoppel. It would have been a direct fraud to repudiate an obligation after such conduct as could not have failed to induce the insured to rest satisfied with their policies.

The controversy is reduced to the inquiry, whether, with the written conditions of the policy in view, Atwater had authority, or Earle and Reynolds were justified in assuming he had authority to bind the company by such conduct as would have bound himself.

This case does not show that the condition against further insurance without written consent endorsed on the policy, is one which is imposed by the charter of the company; which has in some cases required all contracts to be in writing, and to be signed by the company officers.—See *Insurance Co. v. Colt, 20 Wallace, 560; Spitzer v. St. Mark's Insurance Co., 6 Duer's R., 6; Blanchard v. Atlantic Ins. Co., 33 N. H., 9; Couch v. City Fire Ins. Co., 38 Conn., 181.*

Neither is this shown to be a mutual company, under whose by-laws, brought home to the members, and binding them, an agent or officer cannot deviate from the condition, as has been held in some cases.—*American Ins. Co. v. Gilbert, 27 Mich., 429; Van Buren v. St. Joseph Co. Village Fire Ins. Co., 28 Mich. R., 398; Barrett v. Union Mut. Fire Ins. Co., 7 Cush., 175; Forbes v. Agawam Mut. Ins. Co., 9 Cush., 471; Hale v. Mechanic's Mut. Fire Ins. Co., 6 Gray, 173; Stark Co. Mut. Ins. Co. v. Hurd, 19 Oh., 149.*

Neither is this a case where the consent was, under the policy, to be given by any one but Atwater, or where his

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written endorsement would not bind the company.—*Security Ins. Co. v. Fay, 22 Mich., 467; Continental Life Ins. Co. v. Willets, 24 Mich., 268.*

We need not, therefore, consider the correctness of any of those decisions which rest upon the disabilities of agents or officers arising from want of power, plainly notified or known, to act in the business. By the terms of the present policy Atwater was to countersign it, and any policy which he countersigned would have bound the company to an innocent holder, whether he had or had not violated his duty to his principal. Earle & Reynolds were to deal with him, and with no one else.

It was held in *Hibernia Insurance Co. v. O'Connor, 29 Mich. R. 241,* that delivery by an agent, of a policy and renewal certificate, as valid and effective instruments, made them good and binding without being countersigned by him, although countersigning was required by their terms. Such delivery was held a waiver of the formal condition. And it has been more than once held by this court, that where an agent in giving a policy has, by his own conduct, misled parties into making applications or accepting conditions under a misapprehension as to their literal accuracy, the company is estopped by his action.—*Michigan State Ins. Co. v. Lewis, 30 Mich., 41; Continental Insurance Co. v. Horton, 28 Mich., 173; Peoria Ins. Co. v. Perkins, 16 Mich., 380; Ætna Live Stock, Fire and Tornado Ins. Co. v. Olmstead, 21 Mich., 246; N. A. Fire Ins. Co. v. Throop, 22 Mich., 146; Peoria M. & F. Ins. Co. v. Hall, 12 Mich., 202; Niagara Fire Ins. Co. v. De Graff, 12 Mich., 124.*—See also to the same doctrine, *Insurance Co. v. Mahone, 21 Wal., 152; Mitler v. L. Insurance Co., 12 Wal., 285; Ins. Co. v. Slaughter, 12 Wal., 404; Ins. Co. v. Wilkinson, 13 Wal., 222.*

It has been held that all of those conditions and provisions which involve forfeitures are to be construed strictly. Such is the common-law rule in regard to forfeitures, and it is a wholesome and sound rule. Parties may contract

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very much as they choose, so long as they keep within the law; and it may be assumed there is some reason for each condition adopted. But there is great hardship in allowing parties to keep money which they have not fairly earned, and great wrong in favoring blind conditions, or those which parties do not fully understand, where they are not in actual fault. A close construction is the only just one.

In *Insurance Co. v. Colt, 20 Wal., 560,* it was held that although by a corporation charter all contracts, policies, etc., were required to be in writing or in print, sealed by the corporation and signed by the president and attested by the secretary or other officer appointed for that purpose, yet this only applied to the executed contracts and policies, and that an agent could bind the company by a preliminary contract, which they would be compelled to perform. In that case the policy was not made out until after the fire, but it was held to relate back to, and to be in performance of, the preliminary bargain. The decision refers to several analogous cases, and rests upon the analogies of specific performance, where, although land can only be conveyed by deed, yet an agreement for a conveyance need not be itself of the same character as a specialty.

In *Insurance Co. v. Webster, 6 Wal., 129,* a policy on which after its delivery a memorandum was endorsed that it should take effect upon the approval of a general agent named, was held valid and effectual until disapproved.

In *Peck v. New London Co. Mutual Ins. Co., 22 Conn., 575,* where a charter required the consent of the directors to further insurance, it was held that consent given by an agent should be regarded as their consent, and that every agent might, if necessary, stand as a secretary for that purpose.

So it was held in *Hatton v. Beacon Ins. Co., 16 Q. B. U. C., 316,* that where an agent stated that an endorsement was unnecessary, it was a waiver of a condition requiring endorsement.

It is very well settled that, except where prevented by

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the operation of the statute of frauds, or some other equivalent prohibition, a policy of insurance may be made or changed by parol.—*Sanborn v. Fireman's Ins. Co., 16 Gray, 448; Kelly v. Com'th Ins. Co., 10 Bosworth, 82; Audubon v. Excelsior Ins. Co., 27 N. Y., 219; Baxter v. Massasoit Ins. Co., 13 Allen, 320.*

The fact that a policy is written does not prevent its change by subsequent parol agreement. Any written contract not within the statute of frauds may be changed by parol.—*Seamen v. O'Hara, 29 Mich., 66.* And this has been applied to the enlargement, and continuance of policies.—*Kennebec Co. v. Augusta Ins. Co., 6 Gray, 209; Trustees 1st Baptist Ch. v. Brooklyn F. I. Co., 19 N. Y., 305.*

The powers of Atwater in the present case do not appear to be restricted in any way. The condition literally applied would prevent any unendorsed consent by the company itself, by resolution of its board, or by act of its officers, as effectually as by any one else. And the case seems to settle down to the simple question whether a person who has agreed that he will only contract by writing in a certain way, precludes himself from making a parol bargain to change it. The answer is manifest. A written bargain is of no higher legal degree than a parol one. Either may vary or discharge the other, and there can be no more force in an agreement in writing not to agree by parol, than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it.

We think the case was properly laid before the jury upon the important issues.

The evidence concerning the purchase of the additional machinery was proper as part of the *res gestæ*. It was the occasion for the new insurance, and while it would not have validated this without some consent or action of the agent or company, it furnished a very good reason for such consent. The error assigned, on which it is claimed the

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court erred in refusing to charge that the purchase did not affect the condition, is not founded on the record. The request for that charge was not separate, but asked a charge that the policy was made void unless there was written consent, and this addition concerning the purchase was a part of that general request which the court rightly refused.

Objection was also made that some answers to the interrogatories in a deposition of Earle's were not responsive. We do not think this was the fact.

Error is also assigned upon a refusal to charge that if the jury believed Mr. Atwater's testimony they must find for defendant. The court told them that if they considered it a square denial of Earle's testimony, and believed it, they should so find, but remarked that counsel had claimed it was not, and so it was left for them to determine.

It certainly belonged to the jury to settle this question, where there was a dispute about it. But we do not think a court is bound to present any such proposition to a jury as will confine them to considering one witness more than another. There may be no objection to it if the case is plain and if the court finds it will simplify matters to do so. But it is a very different thing to hold that a court is obliged to do it. The duty of the court is ended when the jury have been properly charged upon the law as applicable to the facts, and it is more important that they consider the facts themselves in the light of all the testimony, than by singling out witnesses whom they may believe wholly, or partially, or not at all, according as they are convinced.

We find no error in the record, and the judgment must be affirmed, with costs.

The other Justices concurred.

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Roswell D. Denison v. Sidney B. Smith.

Superior court of Grand Rapids: Special and limited jurisdiction. The superior court of Grand Rapids is a court of special and limited jurisdiction as to persons, and its jurisdiction, therefore, must be shown, and cannot be presumed.

Municipal courts: Process. A municipal court created for a city would be an anomaly if it could send its process abroad for general purposes.

Joint defendants: Process: Service beyond the county: Superior court of Grand Rapids. Under the statute (*Comp. L. § 5748*), providing in the case of joint debtors for service of process of the circuit courts out of the county where one is served within it, an absent defendant cannot lawfully be pursued until service has been made and proved on some one of the joint defendants within the jurisdiction; this is a condition precedent; and the state of the record itself at the time of such foreign service must disclose a compliance with this condition. And the legal rules applying to service in such cases is expressly adopted as governing service beyond the city of the process of the superior court of Grand Rapids.

Judgment: Default: Jurisdiction of the person. A court cannot lawfully render judgment against a party who has not appeared, without some evidence of jurisdiction; and the statute (*Comp. L., §§ 5724, 5732*) only allows a default on proof of service.

Amendments: Service of process: Return: Jurisdictional defects. The statute of amendments (*Comp. L., § 6051*) saving judgments by default as against any "imperfect or insufficient return," cannot go beyond formal defects, or those by which "neither party shall have been prejudiced," and does not reach defects in jurisdictional showing.

Superior court of Grand Rapids: Service of process. The phrase in the statute organizing the superior court of Grand Rapids, as to service made on a defendant "*in Kent county*," means outside the city of Grand Rapids; and a return showing only such service is equivalent to "not found" in the jurisdiction; and after such a return a co-defendant out of the jurisdiction is not bound to watch the records, and could not be affected by a subsequent amendment of the return, made *ex parte*, and still less could it be retroactive against him.

Heard November 3. Decided January 5.

Error to Superior Court of Grand Rapids.

Clay, Boynton & Maher, for plaintiff in error, to the point, that the superior court being one of special and limited jurisdiction, it is erroneous for it to render judgment when its record does not show upon its face that it has acquired jurisdiction by a compliance with the prescribed statutory terms and conditions, cited: *Dred Scott v. Sanford, 19 How., 393-400; Frees v. Ford, 7 N. Y.,*

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176; Simonds v. De Bare, 4 Bosw., 547; Platt v. Stewart, 10 Mich., 260; Burkle v. Eckhart, 3 Denio, 279; Beach v. Bitsford, 1 Doug., 199; Greenvault v. Farmers' Bank, 2 Doug., 498; Merrill v. Montgomery, 25 Mich., 73; Thatcher v. Powell, 6 Wheat., 119; Denning v. Corwin, 11 Wend., 647; O. & M. R. R. Co. v. Shultz, 31 Ind., 150; State v. Gaudesuhiener, 30 Ind., 63.

The plaintiff being a non-resident of the city, a service upon one of the defendants within the city was a condition precedent to the authority of the court to act in the cause. Without such service no act or omission on the part of the defendants could confer jurisdiction.—*Burkle v. Eckhart, 3 N. Y., 132; Simonds v. De Bare, 4 Bosw., 547; Farrand v. Bentley, 6 Mich., 281; Spear v. Carter, 1 Mich., 19; Horum v. Hannah, 3 Blackf., 48; Hart v. Malony, 2 N. H., 322; Grand Rapids v. Whittlesey, 32 Mich., 192.* And had the defendants appeared and joined issue in the cause and gone to trial and obtained judgment, the plaintiff might have brought error on the ground that the court never acquired jurisdiction.—*Capron v. Van Noorden, 2 Cranch, 120; Striker v. Mott, 6 Wend., 465; Jordan v. Dennin, 7 Metc., 590.*

The statute of amendments applies only to defects in matter of form, and it was as much a matter of substance for the defendant to be informed by the return whether or not the court had jurisdiction, as to be informed by the plaintiff's declaration of the nature of his claim.

Taggart, Allen & Wolcott, for defendant in error, argued that the fact of service of process is what gives the court jurisdiction of the person, and not the return of the sheriff; and that the amendment of his return does not change the fact, but merely the evidence of service; and cited: *Dunn v. Rogers, 43 Ill., 260; Bacon v. Bassett, 19 Wis., 54; Thatcher v. Miller, 11 Mass., 413;*

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Kitchen v. Reinsky, 42 Mo., 427; Gavitt v. Doub, 23 Cal., 78; Jackson v. Ohio, etc., R. R. Co., 15 Ind., 192; and they also cited and relied upon the statute:—*Comp. L. 1871, §§ 6051-2.*

CAMPBELL, J:

Smith sued Denison jointly with one Bush, upon contract, in the superior court of Grand Rapids. Suit was commenced by declaration, and the sheriff made return of service on both defendants in Kent county, and did not certify that either was served in Grand Rapids. Judgment was rendered by default, on the 10th of July, 1875. On the 19th of July, upon an *ex parte* motion, the sheriff was allowed to amend his return so as to show service on Bush in Grand Rapids before service was made on Denison. The errors assigned in this court are based upon the irregularity of the default, when no jurisdiction appeared.

The jurisdiction of the superior court is declared to extend to civil cases involving more than one hundred dollars, where service of declaration or process is made on one or all of the defendants within the city of Grand Rapids, or where the plaintiff resides in Grand Rapids and service is made on a defendant in Kent county.—*L. 1875 p. 44, § 13.* It does not appear from the declaration that the plaintiff resides in Grand Rapids, and therefore the jurisdiction depended on the proper service of process on Bush.

The court in question, though having a large jurisdiction over causes of action, is a court of special and limited jurisdiction as to persons, and in all such cases jurisdiction must be shown, and cannot be presumed. In *Turrill v. Walker, 4 Mich. R., 177,* it was held a circuit court process could not be served without the county, in the absence of any statute authorizing it, and that court, though having general powers, could have no jurisdiction over persons not found where they could be lawfully served. A municipal court created for a city would be an anomaly, if it could

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send its process abroad for general purposes. The powers of the circuit courts to reach defendants beyond the county, is confined to cases where one, at least, is served within it. In the case of joint debtors the practice is governed by *section 5748 of the Compiled Laws.* That section expressly contemplates a service at home on one or more defendants, before the plaintiff can sue out further process or deliver a declaration to be served beyond the county on the rest, and in the case of process it evidently requires a return of "not found" as a preliminary. The language, though not precise, contemplates some evidence of service on one as a foundation for a further writ, and the same provision allows the plaintiff to have his declaration and notice of rule to plead, which are a substitute for process, "served on the defendants not elsewhere served in any other county in this state." It was never intended that an absent defendant should be pursued until service was made and proved on the other within the jurisdiction. That is a condition precedent. A defendant has a right to know from the record whether he is subject to the jurisdiction; and where it depends on a previous service on some one else, that can only be shown by the return of service, or by appearance.

Neither can a court render judgment against a party who has not appeared, without some evidence of jurisdiction. In *Wells v. Walsh, 25 Mich. R., 344,* it was held that where a publication was had in attachment, although regularly made, no default could be entered until after proof of publication was filed. The statute only allows a default on proof of service in any case.—*C. L. §§ 5724, 5732.* It is claimed, however, that by the statute of amendments no judgment by default shall be reversed for any "imperfect or insufficient return."—*C. L. § 6051.* This, however, must be read in the light of the whole section, and cannot go beyond formal defects or those by which "neither party shall have been prejudiced."

A defect in jurisdictional showing cannot be held formal or immaterial. And the return in the present case was

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not imperfect or informal. It was full and perfect in declaring the service to have been in the county of Kent (which phrase under this statute means outside of Grand Rapids), and therefore notified the defendant Denison that Bush was "not found" in the jurisdiction, and that he himself could not be held. An amendment might be proper to found further proceedings and service upon, but after such a return Denison was not bound to watch the records, and could not be affected by the amendment *ex parte*. Still less could it be retroactive against him.

The act creating the superior court expressly adopts the legal rules applying to the service of process from circuit courts beyond county limits, as governing service of process in that court beyond the city.—*Sec. 14, L. 1875, p. 45.* We have already seen what is required in such cases in the circuit courts.

We think the default was not authorized, and that the amendment did not cure it.

The judgment must be reversed, with costs, as to Denison.

The other Justices concurred.

Albert H. Clark and another v. James C. Adams and others.

Log-lien law construed: Personal judgment. The log-lien law (*Sess. L. 1873, p. 466*) is a very crude and imperfect statute, and, if practicable at all as a law, can only be safely applied to the simplest cases. It contemplates proceedings in the nature of a suit *in rem* to enforce a lien, and not one for the recovery of personal damages; and a personal judgment is not authorized.

Construction of statutes. This statute, being one conferring a new right to be enforced by a summary remedy, is to be construed strictly, and all material preliminaries to the right of suit must be complied with, and the record must show it.

Declaration: Allegation of notice: Service by mail. An allegation, in the declaration under this statute, that the plaintiffs, on a day named, "caused

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to be mailed to each of said defendants a notice of the filing of said petition or statement, as required by the act aforesaid," is not an explicit statement of the service of such notice "by depositing the same in the postoffice, directed to the owner of the logs or timber, his agent or attorney, at his or their place of residence, and paying the full postage thereon," which is the mode of service by mail expressly specified by the statute.

Declaration: Allegation of notice: Denial on oath: Admission. The provision of the statute that the plaintiff shall allege the filing of the application or petition for a lien, and that all allegations relating thereto shall be taken to be true unless expressly denied under oath in the answer, does not operate to require a denial of notice on oath in order to put the plaintiff to proof of such notice as the statute specifies.

Service of notice by mail: Evidence. An offer to prove that the plaintiffs on a day named caused to be mailed to each of the defendants a notice in the words and figures following, etc., is not an offer to show such service by mail as the statute requires, in that it does not include a proposal to show that the notice was directed to each defendant at his place of residence, or that full postage, or any postage, was paid; and such defect in the proof of service is fatal.

Service by mail. It is a general rule that when service is sought to be made by mail it should appear that the conditions on which the validity of such service must depend had existence, otherwise the evidence must be deemed insufficient to establish the fact of service.

Submitted on briefs November 3. Decided January 5.

Error to Bay Circuit.

Holmes, Haynes & Stoddard, for plaintiffs in error.

Hatch & Cooley, for defendants in error.

GRAVES, J:

The plaintiffs claim that under certain special contracts made with defendants the latter became indebted to them in a large sum for cutting, banking, running and booming several millions of feet of pine logs, and for unusual expenses and on account of supplies provided at defendant's expense, and they allege that on the footing of this specific indebtedness they proceeded on the 5th of June, 1874, to file a statement or petition with the clerk of the circuit court for Bay County in order to fix a lien upon the logs pursuant to the act entitled "an act establishing a lien for labor and services upon logs and timber," approved April 29, 1873.—*Laws of 1873, p. 466.* This case was begun by

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attachment under this enactment. Several questions are agitated on the record, and a mere glance at the case suggests many more. But as the controversy may be disposed of on a single ground, it is not expedient to spend time in discussing others. The suit was a miscarriage from the beginning, and on whatsoever grounds the court below gave judgment against the plaintiffs, there must be an affirmance. The statute in question reads more like a rough sketch or rude outline of a bill intended to be proposed, than it does like a perfected act, and if practicable at all as a law, there must be great difficulty in applying it safely to any except the simplest cases. It is well known that the first garnishee enactment in this state was produced by the passage, without change, of a mere sketch of some leading provisions of a proposed bill, and it is quite possible that this law may have crept into the statute book through similar inadvertence. Without entering into any general criticism of the statute, it is plain that it contemplates a specific lien for a specific kind of claim, and an enforcement by means of a particular proceeding.

The right and remedy are bound up together and must be construed together. By general reference, it is true, the act borrows from the general law in regard to attachment, but this has no force to duplicate the redress. The proceeding is still distinct from the general attachment law, and the basis of it and the quality of the remedy and the result must depend upon the particular statute. A suit under this law must be carried out under it, and it is one *in rem*, to enforce a lien, and not for the recovery of personal damages. Under no circumstances can the party prosecuting the proceeding go on and use it as a suit commenced by summons for the recovery of damages, as may be done in particular cases under the general attachment law. The separation is by a broader difference than exists between replevin generally and replevin for beasts distrained, and quite as broad as that between a bill for divorce and one for damages. A personal judgment is not authorized.

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The leading feature of the act is to give one a right to hold the property of another upon a claim of having performed work or service about such property, and when no lien, or right to hold the property, would exist otherwise. Now it cannot be doubted but a party undertaking to assert this right of lien, the right to hold the property of a another upon a bare claim for work or services about the property, must be held to a strict compliance with the legal provisions in regard to the nature of the claim and the steps prescribed for the institution and perfection of the lien, and as the right and remedy both arise out of the statute and must go together, all material preliminaries to the right of suit must appear to have been carried out strictly.

I do not pause to consider the objection, that the claim put forward and alleged in the declaration was not one upon which a lien could be established under the statute, nor the objection, that the declaration contained no cause of action under this law because it did not show upon its face that the steps indispensable to the establishment of a lien and the steps indispensable to the founding of a suit were taken. A question arises in regard to a proceeding prior to the declaration and indeed prior to the commencement of the suit, and one which is expressly made necessary before any suit to enforce the lien is begun. By section nine it is enacted, that before any suit shall be commenced to enforce such lien, the person or persons claiming such lien shall give the owner or owners of the logs or timber a notice in writing of the filing the application or petition, the amount and other particulars described; and care is taken to prescribe the manner in which the notice must be given to bring it home to the parties interested, and this is very essential. It declares that "such notice may be served personally, or by depositing the same in the postoffice, directed to the owner of the logs or timber, his agent or attorney, at his or their place of residence, and paying the full postage thereon; and if personally served, notice shall be given five days previous to commencement of suit, and if by mail, no

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action shall be commenced until fifteen days after the mailing of the same."

The only statement in the declaration concerning the giving of notice of the filing of the claim of lien is, that "on the first day of July, 1874, they (plaintiffs) caused to be mailed to each of said defendants a notice of the filing of said petition or statement, as required by the act aforesaid," referring to the statute before mentioned. This it will be observed does not explain the mode of mailing, and does not show that the notice was directed to the place of residence of the party, nor that full payment of the postage was made.

The allegation would not be false if the notices were wrongly or mistakenly directed, or if prepayment of full postage was omitted.

Now the ninth section, before cited, says that "the plaintiff shall allege in his declaration the filing of such application or petition for a lien, and all allegations relating thereto shall be taken to be true, unless expressly denied by the defendant, his agent or attorney, in his or their answer under oath." There was no denial on oath of notice; but in construing such an act as this, it would be going too far to say that the expression, "and all allegations relating thereto," in view of its generality and grammatical relation, must be held to require a denial of notice on oath, in order to put the plaintiff to proof of such notice as the statute specifies. Indeed it would be somewhat strange to require a defendant, on peril of admission, to swear that the plaintiff did not mail a letter directed to him at his abode, and prepay full postage upon it, and very explicit terms would be required to justify a court in holding the legislature meant any such thing. I am therefore of opinion that the statutory notice was not admitted, and was a necessary fact to be proved by the plaintiffs, whatever view may be taken of the contents and shape of the declaration. No evidence was admitted to show the notice, and the only offer of proof on the subject was, that "on the first day of July,

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1874, these plaintiffs caused to be mailed to each of the said defendants a notice in the words and figures following, to-wit:" and setting out a copy of the notice itself.

This offer, as will be observed, did not include a proposal to prove that the notice was directed to each defendant at his place of residence, or that full postage, or any postage, was paid; and this was fatal. The legislature regarded this notice as vital, and not only forbade suit without it, but carefully prescribed the mode of giving it, so as to ensure as far as practicable the effectiveness of service. It is a general rule that when service is sought to be made by mail, it should appear that the conditions on which the validity of such service must depend had existence, otherwise the evidence must be deemed insufficient to establish the fact of service.

The plaintiffs, then, neither made nor offered to make a case entitling them to recover. On the contrary, if we presume they offered all the proof the truth permitted, as to the sufficiency of the service of notice under the statute, they showed themselves not entitled to maintain the action.

The judgment should be affirmed, with costs.

COOLEY, CH. J., and CAMPBELL, J., concurred.

MARSTON, J., did not sit in this case.

The People on the relation of The Board of Water Commissioners v. The Common Council of East Saginaw.

Water commissioners: Bonds: Official duty: Interest: Parties. The board of water commissioners of a city, who have, in pursuance of the act by virtue of which they were called into existence, issued bonds of the city which it is made their official duty to see are paid as they fall due, have an interest not common to all citizens, in the common council performing their duty in regard to raising funds to meet such payment.

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WATER COMMISSIONERS *v.* COMMON COUNCIL OF EAST SAGINAW.

Bond-holders: Remedy: Water commissioners: Official duty. And while it is true the bond-holders have a remedy against the city in case the bonds are not met at maturity, that would not justify the commissioners in sitting quietly by, knowing that such bonds were maturing, and make no efforts to provide funds to meet them.

Cities: Common council: Municipal boards: Local taxation: Discretion. The query is suggested whether it is competent for the legislature to confer upon boards created by it within cities the power to control the discretion of the common council as to the amount of moneys to be raised for local purposes, or to give them authority beyond that of mere agents or assistants of the council.

Common council: City taxes: Discretion. As a general rule the common council of a city should be allowed to determine what taxes ought to be levied for city purposes, and there ought to be no interference with its discretion by the courts except on the most imperative reasons.

Bonds: Payment: Remedy: Mandamus. The water commissioners in this case having a remedy in their own hands to provide funds to meet the bonds about maturing by issuing new bonds for that purpose, as they are authorized to do, their application for *mandamus* to require the common council to raise the money by taxation is denied.

Mandamus: Discretionary writ. The writ of *mandamus* is in most cases discretionary, and where the respondents have acted in good faith, and the question at issue is one more of policy than of right or power, and it is not made to appear that any serious evils will result, the court may justly exercise its discretion and abstain from interfering.

Submitted on briefs November 3. Decided January 5.

Application for *Mandamus.*

Wisner & Draper, for relators.

Timothy E. Tarsney, for respondents.

MARSTON, J:

The legislature in 1873 passed an act to incorporate a board of water commissioners for the city of East Saginaw, to supply the city with pure water, and to provide for the completion and management of the East Saginaw water works.

The first section of this act authorized and empowered and made it the duty of the common council of East Saginaw to appoint five persons, residents and freeholders of the city, who, and their successors, should be a body corporate with certain powers, and amongst others, to purchase, hold and convey personal and real estate, to make by-laws, ordi-

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nances, rules and regulations, and do all legal acts that might be necessary and proper to carry out the effect, intent and objects of the act.

The fourth section gave the board power to borrow, from time to time, and for such time as they should deem expedient, a sum of money not exceeding three hundred thousand dollars, for the purpose of constructing water-works, upon the credit of the said city of East Saginaw, with authority to issue bonds pledging the faith and credit of said city for the payment of the principal and interest thereon, which bonds were to be signed by the board, or a majority of them, and by the mayor of said city, and payable at a period not exceeding twenty years from their date. The amount authorized to be issued was afterwards increased to three hundred and fifty thousand dollars.

Section twenty-two gave said commissioners the custody and control of all money, revenues, accounts and bonds belonging to said board, with authority to deposit the same as they might deem for the best interests of the city, also authorized them to appoint a treasurer, who should pay out such moneys as the board should order.

Section twenty-three made it the duty of said board, whenever their receipts from water rates or other sources accumulated to a certain amount, with the aid of the mayor of the city, to invest the same in stocks, or upon real estate, such investment to be made in the name of said board, and in such manner as to make the same available for the payment of the principal and interest of such bonds; and then provided as follows: "It shall be the duty of said commissioners to pay the interest on such bonds, and, as fast as such surplus fund will permit, also the principal, as the bonds become due, as funds for such purpose shall from time to time accumulate. The said commissioners may, when they have funds for that purpose, purchase the bonds so issued as aforesaid, whether the same shall have become due or not; and in case the said commissioners shall at any

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time not have funds on hand sufficient to meet any of the said bonds at the time when they shall become due, they shall have the right to issue new bonds for such amount as they shall deem expedient, in the place of bonds so becoming due as aforesaid."

Section twenty-four: "It shall be the duty of said commissioners, at least ten days before the time fixed by the charter or ordinances of said city for assessing city taxes, to make a special report to the common council of said city what, if any, sum will be needed by said commissioners, over and above the revenue of said board, to meet the payment of interest or principal of the bonds issued as aforesaid; and it shall be the duty of the common council to raise said amount by special tax, in the same manner as general taxes, to be designated a water tax; and the said amount shall be paid over to said board by the treasurer of said city, weekly, as collections are made."

The petition and answer assume that under and in pursuance of this act the common council of East Saginaw did appoint five commissioners, who qualified and entered upon the discharge of their duties as provided in said act. The petition sets forth, that under and by virtue of the authority in them vested by said act, the said board have, from time to time, for the purpose of constructing water-works for said city, borrowed money upon the credit of said city, and have duly and regularly, in the manner provided in said act, issued bonds to the amount of three hundred and fifty thousand dollars; that there will fall due November 1, 1875, fourteen thousand dollars, and May 1, 1876, fourteen thousand dollars, interest upon said bonds, and on the first day of May, 1876, fifty-one thousand five hundred dollars principal; that there is not, and will not, at the maturity of said bonds, be funds on hand to meet and pay the same unless it is raised by a special tax as in said act provided; that ten days previous to the time fixed by the charter of said city for assessing taxes, a special report was made

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to the common council, that the sum needed by said commissioners, viz.: To pay interest on three hundred and fifty thousand dollars, twenty-eight thousand dollars; to pay water bonds which fall due May 1, 1876, fifty-one thousand five hundred dollars; that the common council directed the sum necessary to pay the interest to be raised, but refused to raise the amount necessary to pay the bonds falling due May 1, 1876. The issuing of these bonds, and the fact that interest and principal will fall due at the time above stated, and that the common council refuse to raise money to meet the principal, are admitted by the answer.

In the brief submitted on the part of the respondents they insist, that the relators have no interest in this matter not common to other citizens, except to maintain the credit of the board, and that the application should therefore have been upon the relation of the attorney general; *second*, that there is another remedy in this case: the bondholders may have an action against the city; and a *mandamus* will not, therefore, be granted.

It is very clear that the relators have an interest in this case which is not common either to the citizens of the state or of East Saginaw. It is made the official duty of relators, as commissioners, to pay both the principal and interest on the bonds issued by them as the same become due, and while it is true that the bond-holders would have a remedy against the city in case the bonds were not paid at maturity, yet that would not justify the relators in sitting quietly by, knowing that these bonds were maturing, and yet make no effort whatever to provide funds to meet them. Their interest did not cease upon the issuing and negotiating of these bonds, nor even upon presenting to the council a report showing the amount of money necessary to be raised to pay them. It still remained their duty to take such other and further measures as might be necessary to accomplish the end sought, *i. e.*, funds to meet the bonds at maturity. The case of *State v. Haben, 22 Wis., 660*, cited by coun-

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sel for respondents, is not in point. Had it been the duty of the city treasurer to pay these bonds upon the order of the board of water commissioners, and had such an order been given the bond-holders, and payment thereon refused, the cases would have been parallel. In the case of *The State v. The City of Cincinnati, 19 Ohio, 178*, under circumstances more closely resembling those in the present case, the writ was granted.

It is insisted in the third place, that the act in question, and particularly *section 24*, if construed to be mandatory, confers upon the board powers which cannot be tolerated under our system of local government; that such boards do not directly represent the people, but are subordinate to the will of the council; that this must necessarily be so for the reason that the most disastrous consequences might follow from permitting several boards to dictate to the council the amount of taxes they should raise in each year; that while the legislature may interfere in the affairs of a municipality, in so far as the latter acts as the agent of the state, yet local matters must be left to the people of the city to regulate as they see fit.

How far it is competent to subject the authority of the common council of a city, as to the amount of taxes necessary to be raised for city purposes, to the control of boards which do not represent a different municipality co-existing within the same city, as a school-district, is a very serious question. That such boards may be provided for, as the agents or assistants of the common council, is beyond question. But if they can be given powers beyond this, if they can control the common council in its discretion, as to the amount of moneys to be raised for local purposes, and compel it to raise such sum as they may deem necessary, it is very evident that the power and authority of the council may be so abridged that it will become the mere ministerial agent of such boards, having no discretion whatever as to the amount of taxes to be raised. Upon this question we

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do not at present desire or intend to express any opinion, preferring to leave it until it becomes necessary to deal with it.

As a general rule, the common council of a city should be allowed to determine what taxes ought to be levied for city purposes, and there ought to be no interference by the courts, with its discretion, except on the most imperative reasons. We are not satisfied that such reasons exist in this case. The relators, under *section 23*, have power to issue bonds to meet payments becoming due in 1876, and it does not appear that if a new issue is made they cannot be negotiated; indeed, we may infer the contrary. The relators therefore have a remedy in their own hands. They will not necessarily be without funds to meet the bonds falling due in 1876, so that it does not appear that any mischief will follow from a refusal to grant the writ.

The writ of *mandamus* is, in most cases, discretionary, and where, as in this case, the common council have apparently acted in good faith, and have refused upon the ground that the taxes to be raised for that year were already too high, so that the question as between the common council and the relators was one more of policy than right or power, and as there are no evils appearing or being threatened, we are of opinion we may justly exercise our discretion and abstain from interfering.

We cannot undertake to correct all differences of opinion, or, indeed, wrongs, by this writ, but only such as appear so serious as to demand interference.

The writ must be denied, but without costs to either party.

The other Justices concurred.

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Eliza Sheldon v. Nicholas R. Hill and another.

Village ordinance: Rescuing impounded animals: Warrant. Under a village charter contemplating process for the arrest of one charged with rescuing impounded animals substantially like the warrant of arrest for offenses triable by justices of the peace, a warrant commanding the officer to arrest the person named and bring her before the justice to answer a complaint filed against her, etc., "in a plea of debt for the penalty to their damage of fifty dollars," etc., is not regular.

Arraignment: Reading warrant: Complaint. Regularly one brought before a magistrate on a criminal charge should have read to him, and be required to plead to, the charge contained in the warrant, and not the original complaint.

Village ordinance: Charter. A village ordinance cannot go beyond the charter in providing penalties for offenses.

Fine or imprisonment: Judgment: Mittimus. Under a charter providing, in case of a fine which it authorizes to be imposed on conviction of certain offenses, for the amount of the fine "to be made of the property of the defendant, if any such can be found," and if not, then imprisonment, a judgment that in case the defendant did not pay the fine and costs she should be at once committed to the county jail, is unauthorized.

False imprisonment: Justification: Process void on its face. Proceedings resulting in such a judgment, and a mittimus void on its face on the same ground, afford no justification to the justice before whom they were taken, or to the officer who executed them, against the action of the person thereby unlawfully imprisoned.

Submitted on briefs November 3. Decided January 5.

Case made from Kent Circuit.

D. E. Corbitt, for plaintiff.

Taggart, Allen & Wolcott, for defendants.

GRAVES, J:

This is a case made after judgment. Hill was a justice of the peace residing in the village of Cedar Springs, in Kent county, and Howard was marshal of the village. Complaint was made before Hill that plaintiff broke the village pound and rescued a certain cow there confined, and that the act was a violation of section six of a certain ordinance of the village. Hill issued to Howard a precept for her arrest upon this charge, and thereupon Howard arrested

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her and took her before Hill, and according to the record made by the latter, he then read the complaint to her and required her to plead thereto, whereupon she pleaded guilty, and he gave judgment against her and issued a mittimus to Howard to commit her to the county jail, and the latter took her to jail accordingly, where, as she testifies, she was detained for the space of seven days. She then brought this suit and defendants proceeded to justify by setting up these proceedings against her.

The declaration is not given in the record. The material questions concern the matter of justification, and they arise upon the charge and refusals. The court overruled her requests and in substance directed a verdict against her, and the jury found accordingly. There was no dispute about the fact of her being taken to jail, or of the defendants' connection with the transaction.

The ordinance, the complaint and subsequent proceedings before Hill as justice, including the warrant of arrest, the judgment and the warrant of commitment, were given in evidence, and Howard's agency in the arrest and final commitment appeared and were not disputed.

The ordinance is entitled "Ordinance No. 2, relating to the impounding of animals and fowls;" and the 6th section, on which the complaint was based, reads as follows: "*Sec. 6.* Any person who shall rescue, or attempt to rescue any animal or fowl from said pound or pound-master, shall be punished by a fine not less than ten dollars nor more than fifty dollars and cost of suit for each offense, or by imprisonment in county jail of Kent county not to exceed ninety days, or both such fine and imprisonment, in the discretion of the court convicting such offender."

This ordinance appears to be warranted by the charter. —*Laws 1871, Vol. 2, p. 512, Sec. 31, clause 18;* also, *sections 49, 50, 51, 52, 55;* and the objection that it was not proved has no apparent tenability.—§ *5953 C. L.* No substantial objection to the complaint has been pointed out. —*Section 55* of the charter.

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The warrant of arrest was not regular. The charter (§ *50*) seems to contemplate a process in such a case agreeing substantially with the warrant of arrest prescribed in the statute giving justices of the peace criminal jurisdiction.—§ *5526 C. L.* But the warrant in question was a considerable departure. It required the marshal to take Mrs. Sheldon and have her forthwith before the justice at his office, to answer a complaint filed against her on behalf of the village of Cedar Springs, for an alleged violation of section six of an ordinance of the village relating to the impounding of animals and fowls, in a plea of debt for the penalty, to their damage of fifty dollars, and after the arrest to notify the plaintiff thereof. Being taken before the justice on this paper, she was required to plead to the complaint. This was hardly regular. The charge as stated in the warrant should have been read to her, and she should have been required to plead to that, and not to the original complaint. —§ *50 of the charter,* and § *5529, C. L.* Passing these irregularities we come to the judgment. The record made by the justice himself, as shown by the defense, reads as follows: "May 12, six o'clock in the afternoon. Suit called; D. C. Lyle appeared for the village. The defendant in court, the complaint read, to which the defendant pleaded guilty to the charge set forth in the complaint, to wit: of having on the tenth day of May, 1874, broken open the village pound in Cedar Springs, and rescuing therefrom one cow in violation of said ordinance; I, therefore, the said justice, did adjudge that for the said offense, the said Eliza Sheldon should pay a fine of ten dollars and costs of suit, which amounted to the sum of three dollars, and in default of payment to be at once committed to the county jail for ten days; which fine the defendant refused to pay, therefore the defendant was committed. Fine ten dollars, cost three dollars. May 12, 1874.

"(Signed) N. R. HILL, *Justice of the Peace.*"

Immediately after the giving of judgment, the mittimus was made out, directed to "the marshal of the village of

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Cedar Springs, or any constable of the township of Solon, or Nelson, Kent county, Michigan, and to the keeper of the common jail of said county," and after reciting the conviction and judgment and default in payment, it proceeded to require the marshal, or any of the before mentioned constables, in the name of the people of the state of Michigan, to forthwith convey the present plaintiff into the custody of the keeper of the jail, and the keeper to receive her into his custody and there safely keep her until the expiration of ten days, or until she should be discharged by due course of law.

The defendant Howard, as before stated, took the plaintiff on this precept and conveyed her to jail, where she was kept for some time under it.

The judgment was not warranted by the ordinance or charter. The former could not go further than the latter, and it does not purport to do so. By the charter the council were empowered to impose a fine or imprisonment or both, but no authority is given to adjudge the payment of a fine and the immediate imprisonment of the offender in case of non-payment. The charter not only does not give any such power, but it takes pains to exclude it. The power given to the council to enact the punishment is found in §§ *52 and 54*, and the latter expressly provides that the execution, and which may be issued immediately on rendition of judgment, "shall command the amount to be made of the property of the defendant, if any such can be found, and if not, then to commit the defendant to prison if it be so adjudged, and according to law." A provision immediately follows for those cases where a fine and imprisonment are both positive ingredients of the judgment, but it has no application here, where the imprisonment was only adjudged as a means to enforce payment, or as an alternative to be inflicted upon the contingency of non-payment at the very time of judgment.

The execution intended to be authorized in case of fine and when imprisonment is not made an absolute ingredient of the

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judgment, is similar to that provided to be issued against civil debtors whose bodies may be taken, in so far as the requirement involves an endeavor in the first instance to make the fine and costs out of property.—§ *5387, C. L.* The judgment was void. There was no law to authorize a judgment that in case the defendant did not pay the fine and costs she should be at once committed to the county jail for ten days, or for any other period.

The execution or mittimus was also void upon its face on the same ground, and it afforded no protection to the marshal. It may be well to notice also that it was wrongly directed. It should have been directed to the marshal of the village of Cedar Springs. The charter is express.—§ *55.* How far this irregularity might affect it, if otherwise unobjectionable, it is needless to consider.

These proceedings, then, afforded no justification whatever to either defendant, and the plaintiff was entitled to have the jury instructed in substance as asked in her fourth request, and the charge given was of course erroneous. Several other questions were agitated on the argument, but some of them have no force, and we do not deem it needful to discuss the others.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

Henry H. Ives v. Stephen O'Brien and another.

Finding of facts: Joint defendants: Separate liability. Where the finding of facts in a suit against two defendants fails to show any joint undertaking or liability of both, but rather shows a separate liability of one defendant only, it will not support a judgment against both defendants.

Heard November 3. Decided January 6.

Case made from Kent Circuit.

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D. E. Corbitt, for plaintiff.

Taggart & Allen, for defendants.

COOLEY, CH. J:

We have looked in vain through the referee's findings of fact for any thing to warrant his conclusion that the defendants entered into any joint undertaking with this plaintiff. The circumstances relied upon as rendering O'Brien liable, would show a separate liability, if any thing, and they tend to negative, rather than to support any inference that either he or the plaintiff understood that O'Brien was to be jointly responsible with Stewart. The finding of law is consequently without any support in the facts.

The judgment must be set aside, and judgment entered in this court for the defendant O'Brien, with costs of both courts.

The other Justices concurred.

Stephen W. Blaisdell v. Samuel W. Todd.

Contract of sale: Title: Possession: Replevin: Cause of action. One who has contracted to sell chattels on credit with a present delivery, on condition that the vendee should perform a certain job of work he had contracted to do for the vendor, of the contract price for which a certain portion was to be applied in payment for said chattels, cannot, after the work has been substantially performed, transfer separate from the contract any title or interest in the chattels in his vendee's possession to a third person, so as to vest in the latter a cause of action in replevin.

Heard and decided January 5.

Error to Allegan Circuit.

This was replevin brought by Todd against Blaisdell, for a yoke of oxen and an ox yoke. Blaisdell had contracted with one Sherman to haul all the oak and pine logs on a

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described parcel of land, and deliver the same on the bank of Kalamazoo river, one hundred thousand feet to be delivered by December 1, 1872, and two hundred thousand feet more, or the job to be finished, by April 1, 1873, at two dollars per thousand feet, of which one dollar per thousand was to be applied in payment for the oxen in question, and two chains and a swamp hook, which said Sherman by said contract agreed to sell Blaisdell for one hundred and sixty dollars, on condition that the latter should perform said work, the team and other property to be delivered at once, but not to be considered as fully paid for till the job of work was done, and in case Blaisdell failed to finish the job, to revert back to Sherman.

It appeared on the trial that there were only forty thousand feet of logs on the parcel; that Blaisdell hauled all but eight or ten scattering logs that were cut on this parcel, and then quit; but that he hauled other logs, enough to make upwards of eighty thousand feet in all; that a controversy having arisen between Sherman and Blaisdell, as to whether the latter had performed his contract, Sherman sold his interest in the oxen to Todd for one hundred and sixty dollars, but did not transfer the contract; and that Sherman was then owing Blaisdell on the contract about one hundred and twenty dollars. The case was tried before the court without a jury, and judgment was rendered for plaintiff, and defendant brought error.

Pope & Stuck, for plaintiff in error.

Joseph Thew, for defendant in error.

THE COURT held that the facts found show that the contract was substantially performed by Blaisdell; that Sherman had no title or interest in the oxen that could be transferred separate from the contract; and that the facts found, therefore, did not support the judgment.

Judgment reversed.

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Calvin C. Burt v. Anson Olcott.

Assignments of error. Assignments of error must be specific.

Evidence: Objection to question: Exception: Objections to the answer. Where a proper question has been allowed against objection, the exception to this ruling will not support an assignment of error directed against the effect of the answer as evidence in going beyond the scope of the question, where no such objection was made, and no exception taken below that would raise that point.

Heard and decided January 5.

Error to Jackson Circuit.

This was an action brought by Burt for services as an attorney, commenced before a justice, and taken by appeal to the circuit. The judgment below was in favor of defendant, and the plaintiff brings error. The assignments of error were several of them general, as (1) the court refused proper and relevant evidence and testimony offered by the plaintiff on the trial of said cause; and (2) the court admitted improper and irrelevant testimony produced by the defendant and against the objections of the plaintiff; and the like. Among other things, complaint is made that the court erroneously admitted evidence of set-off, though no notice of set-off was appended to the plea. The plaintiff having rested his case, defendant gave evidence tending to show that he employed plaintiff to try a suit for him before a justice, for which plaintiff charged him eight dollars, and that he paid him seven dollars at the time. He was then asked whether he ever paid him any more. Objection was made that no plea of payment or set-off had been filed. This objection was overruled and exception taken, and defendant answered that he drew plaintiff some wood. He was asked how much, and the same objection was made and overruled, but no exception taken. The defendant answered that he drew him four cords of wood, and testified without objection as to its value.

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BURT v. OLCOTT.

Calvin C. Burt, in person, for plaintiff in error.

Johnson & Montgomery, for defendant in error.

PER CURIAM:

1. Assignments of error in the general form of most of those in this case will not be considered.

2. The question put to defendant, whether he ever paid plaintiff any more, was not open to the complaint now made, that it tended to prove set-off; but it was a proper question to draw out evidence of payment, which may properly be shown under the general issue. If the answer as given tended to prove set-off rather than payment, that was not ground of objection to the question; and the exception to the ruling admitting the question will not support an assignment of error directed against the effect of the answer as evidence. The question being proper, the ruling admitting it was proper; and any objection to the answer as going beyond what the question called for, cannot be raised upon an exception to the correct ruling admitting the question; and, therefore, the real ground of complaint here sought to be urged is not supported by any exception.

Judgment affirmed.

Jonas Reed v. Isaac N. Gage.

Guaranty of collection: Evidence: Judgment: Names: Identity. In an action by Isaac N. Gage upon a guaranty of collection by one Reed, of certain promissory notes made by one Cole, it was held competent to admit in evidence the proceedings and judgment against Cole to enforce collection of the notes, though those proceedings were taken in the name of Newton Gage as plaintiff, where it is shown that the plaintiff's name is Isaac Newton Gage, and that he is the same person named as Newton Gage in the proceedings against Cole.

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REED v. GAGE.

Justice's court: Plaintiff's attorney: Proof of authority: Judgment: Collateral attack. A justice's judgment cannot be attacked collaterally upon the ground of failure to make proof of the authority of the plaintiff's attorney, as required by the statute (*Comp. L. 1871, § 5305*) in case the defendant does not appear.

Heard and decided January 7.

Error to Eaton Circuit.

This was an action upon a guaranty of collection, executed by Reed and endorsed on two promissory notes of one Homer Cole, payable to the order of one Bixby. Gage, having become holder of the notes, sued Cole in justice's court, and took a transcript to the circuit, and there had execution issued, which was returned *nulla bona*. He thereupon brought this action against Reed on his guaranty. On the introduction of the record evidence of the proceedings against Cole, various objections were taken, upon which errors are assigned. The suit against Cole was brought in the name of Newton Gage, and the plaintiff was allowed, against objection, to prove that his name was Isaac Newton Gage, and that he was the same person named as Newton Gage in the proceedings against Cole.

The transcript of the judgment showed that plaintiff appeared by attorney, and that defendant did not appear; and the validity of the judgment, when it was offered in evidence, was questioned on the ground that the record did not show proof of authority of plaintiff's attorney. Judgment having passed for the plaintiff, the defendant brought error.

Shaw & Pennington, for plaintiff in error.

D. P. Sagendorph and *E. A. Foote,* for defendant in error.

PER CURIAM:

1. The identity of the plaintiff with the plaintiff in the suit against Cole was properly and sufficiently proved; and the judgment record in the Cole suit was therefore correctly

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admitted in evidence so far as any objection growing out of the variance in name was concerned.

2. The justice's judgment could not be attacked collaterally upon the ground of failure to make proof, as required by the statute (*Comp. L. 1871, § 5305*), of the authority of the plaintiff's attorney.

Judgment affirmed.

Adam E. Bloom v. Jared Sexton.

Declaration: Assignee: Descriptio personæ. The use of the term "assignee," etc., after the name of the plaintiff in a declaration in trover, does not of itself authorize the conclusion that the declaration purports to be for a cause of action that had accrued to the assignors by a conversion prior to the assignment, and claimed to have passed by the assignment to the plaintiff; but this expression is to be treated as mere *descriptio personæ.*

Record: Questions not raised. Where the trial court has taken the cause away from the jury upon such a ruling, the question of the validity of the assignment is not involved.

Heard and decided January 7.

Case made from Wayne Circuit.

This was trover. The plaintiff described himself in his declaration as Adam E. Bloom, assignee of Meyer & Fleischman, and counted upon a conversion of certain goods described. On the trial he offered to prove the assignment to him by an instrument in writing, and facts tending to show the conversion of the goods by defendant after the delivery and acceptance of the assignment. Objection was made as to the validity of the instrument offered in evidence as an assignment, for defects in the form of its execution, but all the other facts proposed were conceded. The circuit judge ruled at defendant's request that the declaration purported to be for a cause of action that had accrued

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to the assignors by a conversion before the assignment, for which the plaintiff claimed a right of action had passed to him as assignee, by virtue of the assignment; and that the plaintiff was not entitled to recover upon proof of a conversion against himself after the property had passed to him. Verdict and judgment being rendered for defendant, the plaintiff brings the case up for review on case made.

Bloom & Bloom and *Engle & Markham*, for plaintiff.

Don M. Dickinson, for defendant.

THE COURT held that the validity of the assignment is not raised on this record; that the ruling of the circuit judge, as to the cause of action counted upon by the declaration, was erroneous; and that the use of the term "assignee," etc., does not authorize such a construction, but is rather to be treated as mere *descriptio personæ*.

Judgment reversed, with costs, and a new trial granted.

Peter Mayhew v. Thomas Snell.

Justice's judgment: Transcript: Motion to vacate: Collateral attack: Plaintiff's attorney: Proof of authority. **A motion to vacate a judgment docketed in the circuit upon a transcript filed therein of a justice's judgment, is a collateral attack; and the validity of the justice's judgment is not assailable in that way for want of proof of authority of the plaintiff's attorney, as required by the statute (*Comp. L. 1871, § 5305*), on failure of defendant to appear.**

Heard and decided January 7.

Certiorari to Huron Circuit.

This writ was sued out to review the action of the court below in declining on motion to vacate a judgment docketed in the circuit upon a transcript filed therein of a justice's

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judgment. The grounds of the motion were, (1) that the affidavit for the transcript was not signed; and (2) that the justice's judgment was void for want of proof of authority of the plaintiff's attorney, the defendant having failed to appear.—See *Comp. L. 1871, § 5305.*

George S. Engle and *Hoyt Post*, for plaintiff in *certiorari.*

Richard Winsor and *H. B. Carpenter*, for defendant in *certiorari.*

THE COURT held that to review the validity of the justice's judgment on this writ would be to assail it collaterally, and that it is not open to collateral attack for such defects. —See *Reed v. Gage, supra, p. 179.*

Writ quashed.

Seth Smith and another v. Luther Rumsey and others.

Equity pleading and practice: Case made by the pleadings. The rule that the court is to adjudge according to the case shown and issues raised by the pleadings is applied in this case.

Fraudulent conveyances: Homestead. The conveyance by a debtor of land which is exempt as a homestead from any coercive proceedings by his creditors, cannot operate to defraud his creditors, and is not within the statutory regulation which makes a debtor's disposal of property with intent to defraud creditors voidable at the instance of the creditors. *Herschfeldt v. George, 6 Mich., 456*, is modified and limited.

Equity jurisprudence: Sureties: Security: Subrogation: Contribution: Parties. Where after judgment and execution levy against sureties upon a bond, two of the sureties pay the judgment in full, but the levy against their co-surety is retained for their benefit, they may join in a bill in aid of the execution to remove conveyances made by such co-surety in fraud of such execution levy, to the end that it may be made available to them by way of subrogation to enforce contribution; though their claims for contribution are several, yet the levy being neither divisible nor apportionable, the relief sought, so far as it turns on the subjection and enforcement of this lien, is necessarily joint.

Equity jurisprudence: Remedy at law. The objection that the case is properly cognizable at law, and not in equity, is held not well founded.

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SMITH v. RUMSEY.

Co-sureties: Payment: Preserving the debt: Contribution: Security: Subrogation. The payment of the judgment in such case by the two sureties, with the intent to avail themselves by way of subrogation of the lien of the execution against their co-surety to enforce contribution, would not operate in equity to annihilate the debt or destroy the force of the levy as between them and such co-surety; but a court of equity will keep the debt alive and preserve the security of the levy to the extent of the lawful claim for contribution as against the co-surety, and will enforce the right of subrogation.

Fraudulent conveyance: Homestead: Decree. Where a conveyance of land which embraces an undefined homestead interest and something besides, is assailed in equity as fraudulent as against creditors, the decree setting it aside as to so much as is not exempt as a homestead, should provide for an admeasurement and setting off of the homestead according to the situation and value at the date of such conveyance.

Heard October 26. Decided January 11.

Appeal in Chancery from Clinton Circuit.

Spaulding & Cranson and *J. O. Selden,* for complainants.

R. Strickland, for defendants.

GRAVES, J:

Complainants and defendant Rumsey and one E. D. Tripp, on the 12th of April, 1871, became co-sureties on the township treasurer's bond of one Edward L. Smith, a son of complainant Smith, and this Edward L. Smith became a defaulter. The township sued the principal and sureties on the bond, in the circuit court, and on the 17th of February, 1873, recovered judgment for damages, six thousand six hundred and eighty-five dollars and twenty-eight cents, and costs taxed at forty-five dollars and thirty cents. Execution was stayed until April first, 1873, and was issued on the 3d of that month, and on the same day a levy was made on a large amount of complainants' property, including real estate, and also on certain parcels of real estate as the property of the defendant Rumsey. These last parcels were described in the levy as follows: "The west half of the northwest quarter of section twenty-nine, and the east half of the northwest fractional quarter of section thirty, and land sixteen rods east and west by ten rods north and south out of north-

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east corner of southeast quarter of northeast quarter of section thirty, all in township seven north, of range two west, in Clinton county, Michigan."

Within a short time after the levy the amount which the execution called for was fully paid by complainants, one-half by each, and the sheriff, by direction of the attorneys for the plaintiff in execution, retained the writ in his hands. Complainants thereupon filed this bill against Rumsey, their co-surety, and the other defendants, his sons-in-law, the latter claiming as grantees from Rumsey all the lands levied on as his, except forty acres on section twenty-nine, and he making claim of a homestead right on a portion of the land on that section so levied on. The bill is not strictly one for contribution. It insists that on the payment of the judgment a right accrued to contribution, and that the levy, under the equitable doctrine of subrogation, instantaneously inured to complainant's benefit, in so far as necessary to work out contribution under the execution at law, and that the aid of equity is needful, not to expressly decree and compel contribution, but to remove obstacles fraudulently interposed and set up to prevent the obtainment of contribution through the execution and levy. The real purpose is to get rid of these impediments, so that the quota claimed of Rumsey may be collected under the process at law, and as inducement to the right to come into equity for the removal of these impediments, the matters concerning the right to contribution and the right of subrogation are necessarily set forth. The bill states that Smith, the principal, and Tripp, the other surety, are respectively insolvent; that Rumsey is responsible, and in equity bound to contribute to each complainant one-sixth of the debt; but that intending to evade his obligation and cheat and defraud complainants, he, together with his wife, deeded, under date of March 31st, 1873, the day before the stay of execution expired, to his son-in-law, Rollin Hathaway, the northwest quarter of the northwest quarter of section twenty-nine, and also deeded under the same date to James H. Hathaway,

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another son-in-law, the east half of the northwest quarter of section thirty; that he lives on said northwest quarter of the northwest quarter of said section twenty-nine; that all his interest levied on, exclusive of the premises so deeded, is wholly insufficient to satisfy his share of the amount paid on execution; that complainants are informed and believe that the lands so deeded are worth five thousand dollars, and that there was no consideration for the deeds, and that his sons-in-law respectively received them with the intent and purpose of cheating and defrauding complainants in the premises. The bill then asks that Rumsey may be decreed to pay to complainants respectively the sums rightly due them on account of such suretyship and payment; that said deeds may be declared fraudulent and void as against the complainants, and that said Rollin and James H. may be respectively decreed to reconvey the lands described in such deeds to Rumsey, to *the end* that the sheriff may sell the same under and by virtue of said execution and levy to satisfy the amount due from said Rumsey to complainants respectively.

The answer of the defendants, in which all joined, admits the judgment, the conveyances by Rumsey to his sons-in-law, and his residence on the northwest quarter of the northwest quarter of section twenty-nine; but neither admits nor denies the insolvency of the defaulter Smith, or of the co-surety Tripp, the issuing or levy of the execution, the amount of the judgment, or the amount paid by complainants.

It denies liability to contribute, the solvency of Rumsey, and all fraud in deeding to the Hathaways; and insists that these deeds were upon good, valid and sufficient consideration. It then sets up that about the middle of April, 1871, an agreement was made between Rumsey and Rollin Hathaway, whereby the latter and his wife, a daughter of Rumsey, were to work four years for Rumsey for the piece of land specified in the bill as deeded on the 31st of March, 1873, by Rumsey and wife to said Rollin; that immediately

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after this agreement was made, Rollin and his wife began work thereunder, and so continued up to the time of answering; that the land in question at the time of conveyance was not, and is not now, worth more than eight hundred dollars, whilst the work of defendant Rollin and his wife is well worth two hundred dollars per year; that the small parcel of about an acre on the southeast quarter of the northeast quarter of section thirty, embraced in the levy, was sold to said Rollin for cash paid down in 1871; that about the 15th of February, 1872, the defendant Rumsey sold the east half of the northwest quarter of section thirty to James H. Hathaway for two thousand five hundred dollars, and that long prior to the judgment said James had paid to said Rumsey all of the purchase price going to him; that about the 19th of March, 1872, he so paid two hundred and thirteen dollars and forty-five cents in money, and seventy dollars in the amount of a saw and lumber bill he held against Rumsey, and five hundred and ninety-two dollars in a debt Rumsey owed him for work he had done for him; that there was a five hundred dollar mortgage on the land, with accrued interest, and which he, said James, assumed and agreed to pay; that soon after his purchase said James went into actual possession, and has since that time resided on the land. The answer then contains the following matter: "These defendants show and aver that William Bird, an old man, had an interest in said land to the amount of one thousand eighty-four dollars and seventy-five cents, for money which he advanced to the said Luther Rumsey, and for which he was, by an arrangement with the said Luther Rumsey, to have and hold an interest in said land, for the purpose of securing to him his support. These defendants aver and show that the said James H. Hathaway, when he purchased said land, assumed the said obligation of one thousand eighty-four dollars and seventy-five cents, and agreed to secure and pay the same, and has executed and delivered a mortgage for the same."

It is next set up that defendant James has built a house

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worth six hundred dollars on the land, and that at the time of his purchase the premises were not worth more than two thousand five hundred dollars, and are not now, aside from the house; that the northwest quarter of the northwest quarter of section twenty-nine, where defendant Rumsey lives, is his homestead.

Finally the answer avers that the levy was wholly released and destroyed by complainants' payments; and then by way of demurrer makes the point that so much of the bill as unites complainants as co-parties, and also prays joint relief, is not good in law. A general replication being filed, and proofs being taken, the cause was heard upon the merits, and the court made a final decree in favor of complainants. By this decree it was declared that defendant Rumsey was liable, and ought to contribute; that the sum for which he was so liable, and ought to pay to complainants, was two thousand five hundred and ninety-five dollars and twenty-six cents, and that he pay the same.

It was also declared that the levy in the sheriff's hands, on the west half of the northwest quarter of section twenty-nine, and the east half of the northwest quarter of section thirty, and land sixteen rods east and west by ten rods north and south out of the northeast corner of the southeast quarter of the northeast quarter of said section thirty, all in township seven north of range two west, constituted a good, valid and subsisting lien upon said premises, and inured to the benefit of the said complainants. It was further declared that the deed from Rumsey and wife, of March 31, 1873, to defendant Rollin, for the northwest quarter of the northwest quarter of section twenty-nine, and the deed of like date from Rumsey and wife to defendant James H. Hathaway, for the east half of the northwest quarter of section thirty, were made without consideration, and with intent on the part of Rumsey and the grantees to cheat and defraud complainants, and were, as to the latter, fraudulent and void, and that all of said premises were subject to the payment of the sum of money before mentioned; and finally it was

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decreed that defendants Rollin and James H. Hathaway respectively reconvey to Rumsey, and that the sheriff proceed to sell under the levy, and apply the proceeds, or what thereof may be necessary, to the payment of the sum adjudged by the decree to be due to complainants, and that the latter recover their costs, and have execution therefor. The defendants appealed.

This tedious detail has been deemed expedient for two reasons: *First,* to see what points and issues the case really raises and leaves open for controversy; and *second,* on account of some incongruities in the record.

On turning to the proofs we find the ground of contention much curtailed. The alleged suretyship, the execution and payment by complainants, the retention of the execution and levy by the sheriff, and the utter insolvency of Smith, the treasurer and principal in the bond, and of Tripp, the surety not sued in this case, are facts fully proved, and not now disputed.

The proposition, that the court is bound to adjudge according to the case shown and issues raised by the pleadings, is so evident, and has so repeatedly been expounded and applied in this state, that any thing beyond a reference to it would scarcely be excusable. Without noticing all the cases, or any of the most recent, it is enough to cite the following by way of illustration.—*Thayer v. Lane, Walker Ch., 200; Manning v. Drake, 1 Mich., 34; Van Dyke v. Davis, 2 Mich., 144; Smith v. Brown, Ib., 161; Cicotte v. Gagnier, Ib., 381; Warner v. Whittaker, 6 Mich., 133; Wright v. Dudley, 8 Mich., 115; Bloomer v. Henderson, Ib., 395; Barrows v. Baughman, 9 Mich., 213; Gorham v. Wing, 10 Mich., 486; Dunn v. Dunn, 11 Mich., 284; Peckham v. Buffam, Ib., 529; Moran v. Palmer, 13 Mich., 367.*

This rule, so manifestly proper in itself, has a direct and plain application in this case.

The bill raises no question whatever in regard to the title to the one-acre parcel on the southeast quarter of the

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northeast quarter of section thirty, claimed by Rollin Hathaway. In describing the property levied on as owned by defendant Rumsey, that piece was included, and that is all. There is no charge or statement to affect the ownership, or any claim for the removal of any obstacle in the way of the execution. The remedial features of the bill ignore this piece, and there was no ground for that portion of the decree which assumes to positively subject it to the execution.

The bill and answer perfectly agree that the specific parcel deeded by Rumsey and wife to Rollin Hathaway, March 31, 1873, is the northwest quarter of the northwest quarter of section twenty-nine, or, as may be said, the north half of the west eighty acres of the quarter; and they equally agree, after amendment by stipulation, that Rumsey's residence was and is on the same parcel; and the proofs show that the deed, as drawn, executed and delivered, on the part of Rumsey and wife to Rollin Hathaway, actually described the land deeded in this way; and further, that the deed continued in such shape, not only until after the levy, but for many months after the bill was filed, and was then altered by the grantors so as to cover the south half of the lot, and leave Rumsey's residence unconveyed; and that this change was made under the claim that the original description was a mistake made by Mr. Strickland, the draftsman. There is no pretense of complainants' assent to this change, and they do not admit that there was a mistake. But all this is outside the pleadings, and contrary to the solemn admissions in the record. The claim in the proofs and by argument, that there was a mistake, and the proceedings by Rumsey and wife and Rollin Hathaway and their counsel to correct it, cannot help the defendants, or hurt the complainants. The case must stand as the parties through their mutual pleadings have deliberately made it. In order to vary the grounds of contention and bring in this ingredient, it was indispensably necessary that the course of proceedings should be modified or changed in some way applicable to the circumstances. We do not pause to point out the precise method.

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Looking, then, at the course the parties have chosen to take, it is quite impossible for this court, in the exercise of its appellate power, to adjudge on the hypothesis that the deed to Rollin should have applied, and now properly applies, to the south instead of the north half of the lot.

The pleadings and evidence agree that from a considerable time prior to the levy down to that of his testifying in the case, the home of the defendant Rumsey and his wife was in fact on this north forty acres. There were the dwelling house and out-buildings. Up to the 31st of March, 1873, when the deed was given to Rollin, there is no question but that Rumsey had a homestead there. It was not then subject to execution. It was exempt. It was, however, grantable. It was capable of transfer by deed executed by himself and wife, and since creditors could enforce no process against it, could no more pursue it for their debts against him, than they could pursue for the same purpose the absolute property of the government, the law will not allow it to be said that the transfer of it, if any were made, operated to defraud creditors. When the law declares that a debtor's disposal of his property with intent to defraud his creditors shall be voidable at the instance of his creditors, and at the same time declares that specific property of the debtor shall be exempt as against his creditors' adverse claims, the provisions are in *pari materia*, and must be construed together, and the latter provision must be held to except this exempt property from the operation of the former provision. Certainly it would be very inconsistent to say that a debtor's disposal of property, and which property, in so far as the creditor and his claims are concerned, may be said to have no existence at all, is a fraud upon the creditor.—*Story's Eq., § 367 and cases cited*, and especially *Mathews v. Feaver, 1 Cox Eq., 278*. This position is not within the sweep of the discussion in *Bayard v. Hoffman, 4 J. C., 450*, and numerous similar cases. There the real subject for consideration was, whether stock, or other intangible property which could not be reached by an execution at law,

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might not be subjected to the creditor's claim by the court of chancery, and consequently whether the circumstance alone, that the property from its nature could not be taken on the execution at law, should be held as warranting the proposition that no shift or transfer of such property could amount to a shift or transfer in fraud of the rights of creditors. Upon this question the current of authority in England, and the course of decision and of legislation in this country, have been different. But the reasoning on the question necessarily implies that the property itself is not set apart by the law as positively exempt from all coercive proceedings, both at law and in equity. The debate relates to the existence and importance of a remedy to reach a species of property, not subject to execution, indeed, but still not positively exempted from forced appropriation to satisfy debts; and it supposes that the property is not by law impressed with any character which gives it complete immunity against all coercive proceedings of creditors in all courts, but has a character which may enable it to escape unless the court of chancery afford a remedy. Here the question is different. The law excludes the homestead from all remedies of creditors in all courts, and the power of the creditor to take it against the will of the owner is absolutely subverted. There is no question left as to whether there is or should be a remedy somewhere to subject the homestead. The law has closed the door against all discussion about it. In view of the case, then, as we find the parties have made it, and accepting the fact in which they agree in their pleadings, that Rumsey and wife deeded to Rollin Hathaway the north half of the lot on section twenty-nine, and that Rumsey and wife there resided, and yielding to the proof that at the time of this conveyance the grantors had their home there, I think it follows that when that grant was made Rumsey had a homestead right on the granted forty acres, of undefined territorial extent, and that the grant, in so far as such right extended, cannot be adjudged a fraudulent grant as against the com-

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plainants in their character of creditors of Rumsey. The point is not whether Rumsey may now, after having, as he claims, ceased to be owner, proceed to insist upon the existence of a present homestead right in his favor, but it is whether, on being charged with a fraud against his creditors, in making conveyance of his homestead, he is not entitled to reply: "True it is I did not mean that you should have my homestead for your claim against me, and I conveyed it, but in your character of creditors you were not thereby defrauded, or even prejudiced, since the law positively forbade your subjecting it against my will, either by legal or equitable proceedings, and moreover left in me the perfect right to grant it away, provided my wife would join." It appears to me fallacious to make the question turn upon the present want of ownership in Rumsey, as between him and Rollin Hathaway, and then deal with the transfer as though it related to property in general. A view of that kind must involve a confusion of the order of events and the unwarranted assumption that the owner of the homestead by granting it can defraud his execution creditors.

This opinion, it may be said, disagrees with observations of the chief justice in *Herschfeldt v. George, 6 Mich., 456*, and this is no doubt true. To the extent of the disagreement I cannot assent to what is said in the opinion of *Chief Justice Martin* in that case.

The pleadings leave the title to the south half of the lot on section twenty-nine in Rumsey, and without any conveyance in seeming conflict with the lien originally obtained by the levy. Admitting the right of complainants to have the levy sustained and proceeded under to a sale for their benefit, the pleadings disclose no obstacle in so far as this parcel is concerned.

The defendants raise three objections to the case, which may now be noticed: *First*, they insist that whatever claims the complainants may have for contribution, they are individual, separate and distinct, and not joint, and not matter of joint complaint in equity. Whatever force this objection

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might possess if the case was strictly one for contribution, it is not a valid one here. But there are even cases at law for contribution, where two or more sureties are allowed to join as plaintiffs. Such, for example, where two or more sureties pay the debt out of a joint fund.—*1 Parsons on C., 35 and cases cited.* The present case, however, does not come within the principle on which these cases rest, nor within the principle which discountenances a joint suit. The ground of the complainants' equity here extends to and takes in the alleged security obtained by the township, the original creditor against Rumsey, the co-surety of complainants, and the latter seek to make that security available in their favor against Rumsey, their co-surety. The security in question is a lien on land, obtained by means of a levy. The levy is an entire thing, in the sense of giving a lien capable of being enforced by sale for complainants' benefit; and their rights and interests, however separate in regard to their payments to the township, and in regard to their claim against the pocket of their co-surety, come together and join in the pursuit and subjection of the lien. The levy on Rumsey's land, as an item of security obtained by the township, is in itself indivisible, and hence not apportionable, and the relief sought, in so far as it turns on the subjection and enforcement of this lien, is necessarily joint. This objection, then, is not well founded.

Second. It is also objected that the case is properly cognizable at law and not in equity. This is so clearly without force as to merit no comment.—*1 Story, Eq., §§ 492 to 508; 3 Kent, 124, 12th Ed.; Willard's Eq., 106; Adams' Eq., 267, 269 and notes; 1 Spence, 661 to 664; 2 Ib., 837 to 845; Dering v. Earl of Winchelsea, and Eng. and Am. notes, 1 L. C. in Eq.; 1 Par. C., 38, and 32 n. d.*

Third. It is next claimed that on the payment made by complainants the execution ceased to have any force, and the levy expired. The doctrine in England lends countenance to this position. The courts of equity there lay down

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the principle in very broad language that the surety is entitled to be subrogated to all the securities acquired by the principal creditor,—*Craythorne v. Swinburne, 14 Ves., 160,* where *Lord Eldon* adopts the language of *Sir Samuel Romilly's* reply; but they at the same time hold that where the surety pays the whole amount called for by the security on which he became surety, he cannot be subrogated to that identical security.—*Hodgson v. Shaw, 3 Myl. & K., 183.* And this limitation of the doctrine is rested on what would seem to be a ground quite too narrow and technical to satisfy the sense and jurisdiction of equity. The ground is, that the surety in paying up the amount extinguishes the security, and hence that the latter no longer exists to serve the purpose of subrogation. The reasoning which has attempted to support this view is not satisfactory in itself, or in harmony with the principles on which the equities of sureties rest, or with the general maxims of the court. And notwithstanding the authority with which the rule has been expounded in England, there are not only individual cases, but classes of cases, there within its range in which it has been disregarded.

The weight of authority in this country supports a broader and wiser view. It looks to the relations of the parties, and the substantial rights and duties which are incident to such relations, and not to considerations purely technical, and considers that the debt and the evidence of it, and legal benefits built upon it in the form of liens, ought not to be considered as annihilated if the purposes of equity and justice require the contrary; and where the intention with which the payment is made requires that the security should survive, either generally or against particular persons, and the situation and relations of the parties will fairly admit it, a court of equity will generally, in this country, respect the intention; and treat the security as in being to the end designed, and recognize and enforce the right of subrogation. —See authorities last cited; also *Am. note to Aldrich v. Cooper, 2 L. C. in Eq. (3 Am. from 2d Lon. Ed.), 226 to*

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230, top; Lidderdale's Exrs. v. Robinson's Admrs., 2 Brock., 159; S. C., 12 Wheat., 594; Bk. of U. S. v. Winston's Exrs., 2 Brock., 252; Cuyler v. Ensworth, 6 Paige, 32; Eddy v. Traver, Ib., 524; N. Y. State Bk. v. Fletcher, 5 Wend., 85; Cory v. Leonard, 56 N. Y., 494; Hart v. Western R. R. Corporation, 13 Met., 99; Wall v. Mason, 102 Mass., 313, 316; Low v. Blodgett, 1 Fos., 121; Atwood v. Vincent, 17 Conn., 575; Goodyear v. Watson, 14 Barb., 481; Neilson v. Fry, 16 Ohio St., 553; Dempsey v. Bush, 18 Ohio St., 376; Neal v. Nash, 23 Ohio St., 483.

This doctrine is founded on higher and better reasons than the doctrine announced in England, and the case is within it.

The debt going to the township was indeed satisfied as between the defendants in the judgment, who were the obligors in the bond, and the township, which was plaintiff in the judgment and obligee in the bond, but as the parties were situated and related it was not in equity and justice satisfied as between the complainants who paid and the principal and their co-sureties in the bond, and the very act of payment to the township with intent to keep the security alive as against the defendants in this case, and not to extinguish it, supplied the required circumstance needed in connection with the other facts to invest complainants with the right to claim contribution from Rumsey, and at the same time invested them with the right, as against both Rumsey and the township, to insist that the levy should remain to be enforced for their benefit. And it is an unwarranted assumption to say, that because the security was no longer of efficacy in favor of the township, in consequence of the payment by complainants of the claim made by the township through or upon it, it was therefore no longer of efficacy in equity as between those equally bound, and could not be resorted to as a means to prevent one from throwing his just share of a common burden upon others standing on equal ground with himself. Indeed the equitable right of

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complainants could scarcely be plainer if the township and the defendant Rumsey had concurrently stated to complainants, upon their making payment, that it should in no manner preclude them from having recourse to the levy as against him.

There is not a fact in the case to countenance the notion that an extinguishment of the levy as against him was intended by the township or complainants. The proof is decisively the other way.

On the whole it is clear that notwithstanding the payment to the township, the levy still subsisted as against Rumsey for complainants benefit, that the latter were in the situation of equitable purchasers of the levy from the township for specific uses, and that equity would have interfered to prevent the latter from impairing the force of the levy to their injury, and from taking any step to obstruct or hinder their rightful recurrence to it. No doubt complainants might have so shaped their course as to have canceled the levy, and to have cut off all right to resort to it; but they did not. On the contrary, their action was plainly regulated by the opposite purpose. If the position of defendants' counsel were sound, the right of subrogation in a multitude of cases would prove to be a barren one.

This disposes of all the special objections taken by counsel for the defendants, and the only question remaining relates to the validity of the transfers on the 31st of March, 1873, as against the right of complainants to enforce the levy for their benefit, and so far as necessary to raise the share Rumsey was and is bound to contribute. It was admitted in proof that the judgment and proceedings were stayed as alleged in the bill, until the day succeeding the 31st of March, when these transfers were made; and the payment by complainants was not only proved, but admitted by defendants' counsel in his brief. The retention by the sheriff of the execution after the payment, and the direction of the attorneys for the township that it should be retained, were likewise proved, and there is no claim to the contrary,

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or any claim opposed to what the evidence tends very strongly to show, although there is no express proof on the subject, that the writ was so retained pursuant to an understanding between complainants and the township therefor.

Coming to the question of fact, touching the design with which these deeds were made and received, and the end intended to be accomplished, a few words will suffice. It would be tedious, and would unnecessarily lengthen this opinion, to advert in detail to the facts and circumstances bearing on this point. A careful examination and comparison of all matters shedding light upon the motives and purposes of the defendants, and the nature of the transaction, inspire the opinion that these persons were not acting in good faith, but upon a plan contrived to prevent the subjection of the land for the payment of any share of the judgment.

It follows as a consequence that complainants showed themselves entitled to relief. But the views which have been expressed show also that the relief given below was not appropriate to the case made. The complainants were entitled to a declaration giving them the benefit of the levy as to the east half of the northwest quarter of section thirty, and the west half of the northwest quarter of section twenty-nine, except as to so much of the northwest quarter of the northwest quarter of said section twenty-nine as constituted the homestead of defendant Rumsey at the time he and his wife conveyed to Rollin Hathaway on the 31st of March, 1873, and so far as necessary to raise the amount payable by Rumsey to complainants.

The complainants were further entitled to a decree for an admeasurement and set-off of the homestead according to the situation and value at the time of the conveyance to Rollin Hathaway, and for setting aside the deed to James H. Hathaway, and the deed to Rollin Hathaway, of the 31st of March, 1873, except as to the parcel set apart as constituting the homestead of defendant Rumsey at that date, as fraudulent against the levy and the right of com-

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plainants. No decree should have been made touching the one acre parcel, for the reason before given; and as the conveyed homestead was not liable, and the bounds of it have not been established so as to show how far the deed to Rollin cannot be disturbed, or to what extent the levy can be executed by sale upon the northwest quarter of the northwest quarter of section twenty-nine, provision should have been made for ascertaining the homestead by metes and bounds.

The decree below being wrong, and the defendants being compelled to come to this court or submit to the error, they are entitled to their costs.

The cause should be remanded, with directions to modify the decree according to this opinion, and for such further proceedings as may be necessary.

The other Justices concurred.

Frederick C. Ferton and another v. John Feller.

Supervisors: Tax roll: Authority to make new roll: Altering collection roll. It is not within the scope of resolutions of a board of supervisors authorizing a supervisor to make a new roll in pursuance of the statute (*Comp. L. 1871, § 1004*), to sanction an alteration simply of an existing collection roll which had previously, in due course of law, been delivered to the treasurer for collection, by drawing a pen across the figures therein and inserting other figures in lieu thereof.

Tax roll: Seizure of chattels: Illegal tax: Justification. A seizure of chattels to satisfy the amount set opposite a tax payer's name on the collection roll, which had been thus without authority of law changed after the roll with the warrant attached had been in due course passed over to the treasurer for collection, is held not justifiable; and it is immaterial that by the change the amount was made less instead of greater.

Supervisor: Collection roll: Making alterations: Delivery to treasurer. The power of the supervisor over the collection roll terminates when in regular course it has passed into the hands of the treasurer for collection; and any act of his thereafter in altering the roll is not an official one, but private and personal.

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FERTON v. FELLER.

Taxes: Assessment roll: Collection roll: Variance. It is essential that the collection roll and the original on file in the supervisor's office should correspond; and no lawful change can be made in the former unless sanctioned by the state of the latter, or so as to cause a substantial variance between the two.

Taxes: Formal defects: Illegal seizures. The errors committed here are not cured by the statute (*Comp. L. 1871, § 1129*) providing that taxes shall not be held invalid for formal defects not affecting the merits; the seizure in question being not for a tax, but upon items inserted in the roll unofficially and without authority of law.

Judgment: Form: Statute of amendments. An objection to a judgment entered on special findings of fact, that it is not in form one in trespass, in accordance with the action brought, but is one appropriate to assumpsit, is of no force, since the imperfection would be cured by the statute of jeofails, and, moreover, a proper judgment could be entered in the supreme court on the findings.

Heard October 27. Decided January 11.

Error to Macomb Circuit.

Hubbard & Crocker, for plaintiffs in error.

A. L. Canfield, for defendant in error.

GRAVES, J:

Ferton was supervisor and Beaufait treasurer of Harrison township in Macomb county in 1871, and Feller was a resident tax-payer there on lands and personalty. Ferton made out the tax list in the spring under *sections 987 to 992, Comp. L.*, and in the fall it was passed upon and certified by the board of supervisors (§§ *992, 993, 994, 995, Comp. L.*), and became a record in his office. The board also ascertained and certified to Ferton the various sums to be spread upon the roll and collected in his township.—§§ *997, 998, Comp. L.*

He then proceeded to extend these sums against the tax-payers according to the valuation on the completed and authenticated original roll in his office.—§ *999 Comp. L.* And after the county treasurer had receipted Beaufait's bond as township treasurer (§§ *1000, 1001, 1002*), and on or before the first Monday of December, he delivered to Beaufait a copy of the roll for collection. In this collection copy taxes were set down against Feller as follows:

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	State Tax.	County Tax.	Town.	School.	Total.
Real estate.....	$10 08	$12 60	$10 08	$5 04	$37 80
Personal estate...	68	85	68	34	2 55

Beaufait proceeded to collect and did collect a considerable portion of the taxes, but Feller and some other tax-payers objecting that this collection roll was unlawful on account of defects and errors made by Ferton in extending taxes and in framing the warrant annexed, the board of supervisors, at a session in January, 1875, passed resolutions purporting to authorize Ferton to make a new roll in pursuance of § *1004, Comp. L.*, and also ordering an extension of time for collecting until March 1st, 1875.

Shortly after this action of the board Ferton went to Beaufait, who was lawful custodian of the roll, and appended a copy of the resolutions to it and drew his pen across the figures denoting the amounts of Feller's taxes and set down in lieu of them other figures varying the amount of each item except that under the head of school taxes and reducing the gross amount a little less than a dollar. He made a similar alteration in the cases of three other tax-payers. The existing collection roll was no otherwise changed, and no other roll was made.

Under this roll so altered Beaufait demanded payment of Feller of these items so inserted, as taxes he was bound to pay. Payment was refused, and Beaufait seized and sold Feller's wagon. Feller then sued in trespass before a justice, and recovered. The case was appealed, and on trial without a jury Ferton and Beaufait sought to justify under the collection roll and the proceedings had upon it, but the court, on a special finding, gave Feller judgment for forty-two dollars and forty-two cents and costs.

The case raises the general question whether the findings established a justification. Because if they did not, a recovery was warranted, and we are of opinion they did not.

First. Without attempting to specify the conditions which

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are necessary to authorize the ordering and making of a new roll, or the precise limits set by law in regard to its ingredients, it is sufficient here to say that the act of Ferton was in no just sense the construction of a new roll, and consequently what he in fact did was not warranted or supported by the terms of the authority the board assumed to confer upon him.

In the nature of things there must be a radical distinction between the construction of a new roll and an act which contemplates the continuance of an old one with unchanged identity, and merely alters it in some specific particular. And it would seem like confounding perfectly separate and distinct matters to say that a roll already lawfully in use by the treasurer for collection is made a new one in the sense of the statute by a change of some of the items in it as to three or four tax-payers. Here there was no physical change of one document for another, and no such alteration in the reading as to destroy identity and give to the roll the character of a new one.

Second. The seizure here was not made on the strength of the roll as it stood when drawn up under the statute and delivered to the treasurer, and not for the same gross sum, and not for the same items of amount for state, county and township taxes respectively; and not under a warrant made, attached and directed for the collection of the same items or the same gross amount. The amounts to be collected of Feller when the roll was completed by Ferton, and when the latter attached his warrant and passed the finished document from his statutory power into that of Beaufait for the purpose of collection, were stricken out by Ferton, and the seizure of Feller's property was for items Ferton inserted when he thus struck out the original ones. Had it been made on account of the original items, in disregard of Ferton's alteration, the case would have been open to very different considerations. That Ferton had no power, as a consequence of the bare fact that he was supervisor, thus to strike out and insert, and change the gross sum and the

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respective sums of state, county and township taxes, would seem to be a plain proposition; and we have seen that he got no power to do it from the board of supervisors. No other ground of power can be imagined. In the progress of the statutory events under the tax-law his power had ceased.

It terminated when, in regular course, the collection roll went finally and fully, and in proper time, into the power of the treasurer for collection. His act in altering the roll was not an official one. It was private and personal. It is true the gross amount of the items after the alteration, and for which the seizure was made, was less than the sum officially written down, and to which the warrant applied.

But this cannot aid. What was thus inserted and sought to be collected by the levy was not a tax. It was an unauthorized entry to which the warrant in legal contemplation could not apply. Public policy is opposed to all unwarranted tampering with such matters, however well intended in the particular instance, and the courts ought not to strive for reasons to screen or excuse it. Doubtless cases may occur where corrections of plain clerical inaccuracies may be considered as not objectionable, or seriously so. But the present is not of that kind, and I do not see how we can yield sanction to what was done here without making a precedent of most dangerous tendency. There is no reason to suppose that any thing improper was designed. On the contrary, the facts indicate that the difficulties about the roll were caused by want of knowledge for the proper performance of duties.

Third. The roll first made by the supervisor is carried before the board, and after final correction there, and after its authentication by the chairman, it is delivered to the supervisor, who is required *to file it and keep it in his office.* —§ *995, C. L.* No other roll is brought to the attention of the board, and this alone receives the sanction of the board. With this before him, and the requisite certificates and statements in regard to the taxes to be levied and their

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destination, the supervisor is required to proceed and assess, "according and in proportion to the individual and particular estimate and valuation specified in the assessment roll." —§ *999, C. L.* He is next to make the collection roll, and this is required to be a copy of the corrected roll in his office.—§ *1002, C. L.* As this correspondence is indispensable in the first instance, its continuance is equally indispensable. The symmetry of the proceedings, the consistency of the records and the dependence of the collection roll upon the first roll and their legal connection, all alike require it. As the first roll is to remain in the supervisor's office as a public record or memorial, so the collection roll is to go ultimately to the county treasurer's office to be kept for the same purpose.—§ *1023, C. L.* The entire theory of the system, and all the regulations, contemplate that these documents shall be and continue substantially alike, and in all essential particulars speak the same language when referred to. No lawful change can be made in the collection roll, unless warranted by the state of the roll having the sanction of the board of supervisors; and consequently the collection roll cannot legally be changed so as to be in substantial disagreement with the other. Passing other objections, then, to the validity of the alteration of the collection roll, it was essential that the state of the first roll was such, either on account of its original frame or subsequent amendment, as to warrant the alterations made and leave the two rolls alike.

Now there is no finding whatever to show that the two rolls agreed after the alterations in the collection roll, nor any finding in regard to the shape of the first roll at any time, or in regard to any amendment of it.

It is claimed that whatever errors were committed were cured by § *1129, C. L.* I cannot think so. Feller's property was not seized for a tax, but upon items inserted in the collection roll unofficially and without authority of law. If some private person, supposing himself authorized, and acting in good faith, had stricken out the tax and

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inserted items raising the gross amount to fifty dollars, the sum so inserted would have been no further from a legal tax than that on which Feller's property was seized and sold, and yet no one will claim that a sum so written in the collection roll by a private person could in any legal sense be considered as a tax.

It is said in the brief for plaintiffs in error that the judgment is void, it not being one in trespass. It is true, the judgment is one appropriate to assumpsit, and not trespass. But it is equally true that no error is assigned upon it, and if there had been, it would have been of no importance, because, *first*, the imperfection would be cured by the provisions of *Ch. 190, C. L.*, and if otherwise, then, *second*, a proper judgment could be entered here on the findings. Several questions not noticed, and of more or less importance, were mooted on the hearing, but the objections to the justification which have been considered, are, as it seems to me, fatal, and hence I perceive no necessity for extending the discussion.

I think the judgment should be affirmed, with costs.

The other Justices concurred.

Charles Winchester v. William H. Craig and others.

Trover: Timber: Good faith: Mistake: Damages: Value: Exemplary damages. In an action of trover for the conversion of timber by cutting the same by mistake and without willful wrong from the lands of another in Michigan and transporting them to Toledo, Ohio, the value of the timber standing being $1 50 per thousand, and the cost of cutting, hauling, running, booming, rafting and towing to Toledo amounting to upwards of $9, and the value there $12, a ruling fixing the measure of damages at either the value where taken, together with the profits which might have been derived from its value in the ordinary market, or the market value at Toledo, less the sum expended by defendants in bringing it there and putting it in condition for sale, with interest from the

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date of the conversion, is sustained:—MARSTON, J., with whom COOLEY, CH. J., concurred, holding that in the absence of fraud, violence, or wilful negligence or wrong, the proper measure of damages generally in trover, as in other like actions, is such a sum as will afford compensation for the actual injury sustained, and that the ruling in question was correct as a general principle in cases where exemplary or punitory damages were not admissible;—GRAVES, J., concurring in the result; and CAMPBELL, J., concurring in affirming the judgment upon the ground that the conversion is set forth in the declaration as having occurred in Michigan, and that the only conversion shown to have taken place in Michigan was the original taking and removal of the logs.

Submitted on briefs October 29. Decided January 11.

Error to Wayne Circuit.

D. C. Holbrook, for plaintiff in error, relied upon: *Symes v. Oliver, 13 Mich., 9; Final v. Backus, 18 Mich., 218; Grant v. Smith, 26 Mich., 201;* and *Greeley v. Stilson, 27 Mich., 255.*

Ashley Pond and *G. V. N. Lothrop*, for defendants in error, cited: *Baldwin v. Porter, 12 Conn., 484; Wilde v. Hexter, 50 Barb., 450; Northrup v. McGill, 27 Mich., 238; Dresser Man. Co. v. Waterstone, 3 Metc., 9; Riddle v. Driuin, 12 Ala., 591; Moody v. Whitney, 38 Me., 174; Hill v. Canfield, 56 Penn. St., 454; Greening v. Wilkinson, 1 C. & P., 625; Wood v. Moorewood, 3 A. & E., N. S., 440; Read v. Fairbanks, 13 C. B., 729; Rose v. Lewis, 10 Mich., 483; Delegal v. Naylor, 7 Bing., 460; O'Donohue v. Corley, 22 Mo., 393; Menkens v. Menkens, 23 Mo., 252; Evans v. Kymer, 1 B. & Ad., 528; Ripley v. Davis, 15 Mich., 80; Suydam v. Jenkins, 3 Sandf., 626; Kenedey v. Strong, 14 Johns., 128; Stevens v. Low, 2 Hill, 132; Kenedey v. Whitmore, 4 Pick., 466; Pierce v. Benjamin, 14 Pick., 356; Beecher v. Deniston, 13 Gray, 354; Hurd v. Hubbell, 26 Conn., 389; Cook v. Loomis, 26 Conn., 483; Otter v. Williams, 21 Ill., 118; Sturges v. Keith, 57 Ill., 453; Watt v. Potter, 2 Mass., 76; Sillard v. Whittaker, 3 Bibb, 192; Justice v. Mendell, 14 B. Monr., 12; Hayden v. Bartlett, 35 Me., 203;*

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Polk v. Allen, 19 Mo., 467; Cutter v. Fanning, 2 Iowa, 580; Fitch v. Blount, 7 C. & P., 478; Cook v. Hartte, 8 C. & P., 568; Davis v. Oswell, 7 C. & P., 804; Moon v. Raphael, 2 Bing., N. C., 310; Bodley v. Reynolds, 8 Ad. & El., N. S., 779; Agnew v. Johnson, 22 Penn. St., 471.

MARSTON, J:

Winchester brought an action of trover to recover damages for the conversion by defendants of a quantity of pine saw-logs. It appeared on the trial that defendants were the owners of the north half of section thirty-three, township twenty-one north, range six east, in this state; that they contracted with one Smith to lumber on said land; that by mistake Smith cut the logs in question upon the south half of said section, caused the same to be hauled a distance of about five miles to the Au Sable river, thence run to the boom at the mouth of said river, there rafted and towed from thence to Toledo in the state of Ohio, where they were sold at twelve dollars per thousand feet.

Evidence was also given tending to show that the timber while standing on the land was worth one dollar and fifty cents per thousand feet; that the cost of cutting it was fifty cents per thousand; hauling the logs to the river, five to six dollars per thousand; and their value in the river eight dollars per thousand; that the cost of running them to the boom was thirty-seven and a half cents per thousand; boom charges, one dollar per thousand; rafting and towing to Toledo, two dollars per thousand; and their value there, twelve to thirteen dollars per thousand.

It also appeared that when these logs were cut, the south half of said section was owned by Eber B. Ward, and that he afterwards, and before suit was brought, assigned all his claim and right of action for such cutting to the plaintiff.

The plaintiff claimed to recover the price at which the timber was sold in Toledo.

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The court charged the jury that if they found no willful wrong on the part of the defendants, they might award as damages the value of the property where it was taken, viz.: one dollar and fifty cents per thousand, together with the profits which might have been derived from its value in the ordinary market, or that they might take the market value at Toledo, deduct precisely the sum defendants expended in bringing it to that market and putting it in condition for sale, and award the difference between these two sums, with interest, in either case, from the time the conversion took place; and refused to charge that the plaintiff could recover as damages the price for which the logs were sold in Toledo.

The finding of the jury, as appears from the printed record, was as follows: "The defendants cut the timber on the land of Ward by mistake; the quantity cut was one million ninety-three thousand seven hundred and eighty-six feet; the value on the land after it was cut was two dollars per thousand feet; the value at Toledo, and for which the defendants sold the timber, was twelve dollars per thousand; the expenses of the defendants on the timber in cutting and removing the same to Toledo, nine dollars and thirty-seven cents per thousand;" and they assessed the plaintiff's damages at the sum of three thousand six hundred and thirty-one dollars and forty cents.

It will thus be seen that the only question raised by this record is, where parties by mistake cut timber upon the lands of another, and at their own expense transport it to market and sell it, whether the plaintiff in an action of trover can recover as damages the market value at the time and place where it was sold.

An examination of the authorities bearing upon this question shows that they are not in harmony, and that the courts have not always agreed as to the proper measure of damages in this class of cases. Some courts have held, in cases like the present, that the plaintiff could recover as damages the value of the logs at any place to which they were taken and sold or converted, while others have held

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such a measure of damages applicable only in cases where there was fraud, violence or willful negligence or wrong, and that where none of these elements appeared, but on the contrary the defendants had acted in entire good faith, and had by their labor and skill materially enhanced the value of the property converted, the plaintiff could not recover such enhanced value. In this last class of cases the decisions are not uniform as to whether the value of the property when first severed from the realty, as in cases of timber or coal, where this question has arisen, or the value in its original condition, with such other damage to the realty as the injury may have caused, would constitute the proper measure.

It is apparent upon examination that there is no fixed, definite measure of damages applicable in all cases of conversion of property; and while the general rule undoubtedly is, in ordinary cases, that the full value of the property at the time and place of its conversion, together with interest thereon, is the correct measure of damages in actions of trover, yet, as was said in *Northrup v. McGill, 27 Mich., 238*, "this rule yields, when the facts require it, to the principle on which the rule itself rests, namely: that the recovery in trover ought to be commensurate, and only commensurate with the injury, whether that injury be greater or less in extent than the full value of the property and interest." Indeed, the language here quoted is but an application to actions of trover of the general rule as repeatedly declared in this state, viz.: that except in those actions where punitory or exemplary damages may be given, and those whose principal object is the establishment of a right, and where nominal damages may be proper, the only just theory of an action for damages, and its primary object, are that the damages recovered shall compensate for the injury sustained.—See *Allison v. Chandler, 11 Mich., 542; Warren v. Cole, 15 Mich., 265; Daily Post Co. v. McArthur, 16 Mich., 447.*

It is somewhat difficult to conceive why, upon principle, this rule should not be applied in its fullest extent to cases

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like the present. The cases, it is believed, all agree that punitory or exemplary damages are never given or allowed in cases where the defendant has acted in entire good faith, under an honest belief that he had a legal right to do the act complained of, although, even in such cases, he would be conclusively held to have contemplated, and the plaintiff would be permitted to recover, all the damages which legitimately followed from his illegal act, whether in fact he actually contemplated that such damages would follow or not. Such damages, however, would, in no just sense of the term, be held as punitory or exemplary; they would be but the actual damages which the plaintiff had suffered from the wrongful act of the defendant. Such then being the general rules applicable in cases even of active, aggressive wrongs, what is there in this case to make it an exception?

It does not require any argument, and I shall attempt none, to prove that the pecuniary injury sustained by the plaintiff, from the trespass complained of, falls far short of the value of these logs at Toledo; and that to award the value at the latter place as the measure of damages would be much more than compensation, and would, although under a different name, be but awarding exemplary damages, and that, too, in a case where upon principle the defendants had been guilty of no act calling for such a punishment.

It is also clear beyond question that had the plaintiff commenced any other form of action to recover damages for the injury which he sustained, he could not in such action recover the market value of the logs at Toledo. It is very evident, therefore, that the right of the plaintiff to recover the value at Toledo depends entirely upon the particular form of action adopted in this case; as, in any other, where the defendants had acted honestly, he could only recover the amount of the actual injury sustained.

Passing for the present the adjudged cases, I can see no good reason or principle why the measure of damages in

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actions of trover should be different from that in other actions sounding in tort; and to hold that there is such a distinction is to permit the form of the action, rather than the actual injury complained of, to fix the damages. This would be giving the form of action a prominence and controlling influence to which it is in no way entitled, and would be permitting the plaintiff, by the adoption of a particular remedy, to increase the damages at pleasure, and that to an extent which would far more than compensate him for the injury which he sustained, and would also be a positive wrong to the defendants. Such a doctrine, if carried out to its logical conclusion, and applied to many cases which might arise, would be to allow the plaintiff damages so far in excess of the injury which he sustained as to cause us to doubt the wisdom of any rule which would thus sanction a greater wrong in an attempt to redress a lesser.

Let us suppose, by way of illustration, one or two cases which might easily arise: a party acting in entire good faith enters upon the lands of another by mistake, cuts a quantity of oak standing thereon and manufactures it into square timber; this he ships to Quebec, where he sells it at a price which, as compared with the value of the standing timber, renders the latter insignificant. Or, suppose the owner, instead of selling such timber at Quebec, ships the same to some European port, and there sells it at a still greater advance. Or, suppose by mistake he cuts a quantity of long timber, suitable for masts, and forwards it to Tonawanda, or New York, and there sells it. Now, in either of these cases, would it be just to permit the owner of the standing timber, in an action of trover, to recover the value at which it was sold? Would the price for which it sold be the amount of the actual damage which he sustained from the original cutting? The price which it brought in the market was almost wholly made up of the cost and expense of manufacturing and getting it there, no part of which cost or expense was borne by the plaintiff. Why, then, should the plaintiff recover this increased value, no part of

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which he contributed to in any way? Certainly not as compensation for the injury sustained by him, because he sustained no such injury. Neither could it be for the purpose of punishing the defendants, because they have committed no act calling for such a punishment. It can only be placed upon the arbitrary ground that in this form of action the plaintiff can recover the full value of his property at any place he may find it, or trace it to.

Then, again, there is no uniformity in such a rule. One man cuts timber, but does not remove it; another cuts and removes it a short distance, adding but little to its original value; while another cuts and removes it a long distance, increasing its value thereby an hundred fold. Separate actions are brought against each, the plaintiff in each case claiming to recover the value at the place to which the timber was taken. Now, it is very evident that although the value of the standing timber in each case was the same, and the actual injury to the plaintiff in each case the same, the verdict would be very different, and the party who had in good faith done the most, and spent the most money, in giving the timber any real value, would be punished the greatest. In fact, by increasing its value he would be but innocently increasing to a corresponding amount what he would have to pay by way of damages. In other words, such a defendant, by his labor and the means which he expended in bringing the property to market, has given it nearly all the value it possesses; and when he is sued and responds in damages to the amount of such increased value, he has then paid just twice the actual market value of the property in its improved condition, less the value of the original timber standing; once in giving it its value, and then paying for it in damages according to the very value which he gave it.

It may be said, however, that all these supposed cases are exceptional and extreme; this may be true, but in testing a supposed rule of law, we have a right to apply it to extreme cases for the purpose of testing its soundness; because by so doing, if we find that when carried out it

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would lead to gross injustice, and would not at the same time subserve any useful purpose, but would be in violation of other well settled legal principles, we then have a right to discard it as being unsound, not based upon sound reason or justice, and therefore contrary to the doctrines of the common law.

It might also be said, in answer to some of the cases supposed, that the plaintiff could not count upon a conversion which took place in some other state. This I am inclined to think would be correct; but in this case the plaintiff does claim to recover for a conversion which took place beyond the limits of this state. I have therefore only carried the doctrine contended for a little farther.

We need not, however, go beyond the boundaries of this state to imagine cases almost as glaringly unjust as those already supposed; indeed, the evidence in this case showed that while the value of the standing timber was one dollar and fifty cents per thousand, the value of the logs in Detroit was twelve dollars per thousand; and cases may easily be supposed where the value would be much greater.

There is another class of cases where the doctrine which plaintiff seeks to have applied would work gross injustice: a person honestly and in good faith obtains possession of some young animal; he may have purchased it from some person supposed to have a good title to it, but who in fact did not; or he may have purchased it at a judicial sale where, on account of some technical defect, the title did not pass; or it may be through a case of mistaken identity he has claimed to be the owner, whereas, in truth and fact he was not. He retains possession, feeding and taking care of the animal until in process of time it becomes full grown and immensely more valuable. This time may be longer or shorter, depending very much upon the kind of animal. If a pig, but a short time would be required; if a calf or colt, a longer. The original owner, having at length discovered his property, demands possession, which being refused, he brings trover to recover the value. Now, most assuredly, in any of these

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cases, the extent of the injury which the plaintiff sustained would not be the then value of the animal. He has not fed it, taken care of it, or run any of the risks incidental to the raising of stock; all this has been done by another. Why, then, should he recover this increased value? And why should the result of the labor, care and expense of another thus be given to him? True it is, that the amount involved in these cases is not so large, but the principle is the same.

It is sometimes said that the effect of the view which we have taken would be to compel a party to sell and dispose of property which he desired to retain as an investment, at what he might consider an inadequate price, and at a time when he would not have sold it. This may be true, yet it is no more than what happens daily, and that under circumstances much more aggravating. Take the case of a willful trespasser: he cuts the timber of another into cord wood and burns it; or he takes his grain and feeds it; or cattle, which the owner prizes very highly, and butchers them. In all these cases the owner has lost his property, and the law cannot restore it; the law cannot do complete justice; it cannot fully and completely protect and guard the rights and feelings of others; it can but approximate to it; and because the owner in this way may be compelled to part with his property, and thus a wrong be done him, it would not improve matters to inflict a much greater wrong upon another equally entitled to protection, in order that the first sufferer might be unduly recompensed thereby. The law rather aims, so far as possible, to protect the plaintiff, but at the same time it has a due regard to the rights of the defendants, and it will not inflict an undue or unjust punishment upon them, in cases where they are not deserving it, as a means of righting an injury, especially where it would much more than compensate the owner for the injury which he sustained.

In this case each has an interest in the logs; the plaintiff as assignee of the original owner; the defendant by,

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in good faith, largely increasing their value. Each should be protected in his rights, and thus as nearly as possible substantial justice be done. To allow plaintiff to recover what he here seeks would be to break down all distinction between the willful and involuntary trespasser; a distinction which is based upon sound legal principles, and which is applied in all other forms of action.

What we have here said must not be considered as having any application in cases where the trespass or wrong complained of was willful or negligent. We are not yet prepared to say that the willful trespasser can derive any advantage whatever from his own wrong. On the contrary, there is sound reason for holding that the owner in such cases may reclaim his property wherever and in whatever shape he may find it.

The court under one branch of the charge instructed the jury to allow the market value at Detroit, or Toledo, less the sum of money which defendants expended in bringing it to market. This, we think, was as favorable as the plaintiff had any right in this case to expect. This was allowing the plaintiff more than the value of the timber when it was first severed from the realty. It did not permit the defendants to recover any profit upon what they had done, but protected them to the extent of the advances they had made; and this, we think, was correct.

There might, however, be cases where this rule would not apply, where the market value did not cover the cost of cutting and taking it to market, and cases where it was not sold. In such cases the plaintiff would be entitled to recover the value when the property was first severed from the realty *(Greeley v. Stilson, 27 Mich., 154)*, and was thus in a shape where it could be converted, together with any profits which might be derived from its value in the ordinary market, with interest thereon. If any special damage is claimed beyond this, either to the inheritance or otherwise, it must be sought in some other and more appropriate form of action.

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We think these rules, when applied by careful and intelligent jurors, will sufficiently protect all parties, and will afford no encouragement to trespassers.

We have thus far attempted to dispose of this case upon well settled principles, and without any reference to the decisions bearing upon the subject. It may not be considered inappropriate, however, to consider and briefly review some of the cases in point, with a reference to others, as the views we have above expressed we think are abundantly sustained.

In *Forsyth v. Wells, 41 Pa. St., 291*, the parties were owners of adjoining tracts of coal lands, and the defendant had opened a mine upon his own land, near the line, and worked it for years. The dividing line was not exactly known, and the plaintiff claimed that the defendant had dug coal over the line and out of her land, which was denied. The plaintiff claimed that the measure of damages was the value of the coal when dug in the bank, or what was called "knocked down," while the defendant contended that the measure of damages would be the value of the coal in the ground before he had expended any labor in preparing it for market; in support of which he offered evidence, which was rejected; and the jury was charged that the value of the coal when "knocked down" in the bank was the proper measure of damages. *Lowrie, Ch. J.*, in delivering the opinion of the court, said: "The plaintiff insists that, because the action is allowed for the coal as personal property, that is, after it had been raised or severed from the realty, therefore, by necessary logical sequence, she is entitled to the value of the coal as it lay in the pit, after it had been mined; and so it was decided below. It is apparent that this view would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her more than compensation for the injury done. Yet we admit the accuracy of this conclusion, if we may properly base our reasoning on the form, rather than on the principle or purpose of the remedy. But this we may not do; and especially we may

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not sacrifice the principle to the very form by which we are endeavoring to enforce it. Principles can never be realized without forms, and they are often inevitably embarrassed by unfitting ones; but still the fact that the form is for the sake of principle, and not the principle for the form, requires that the form shall serve, not rule, the principle, and must be adapted to its office.

"Just compensation in a special class of cases is the principle of the action of trover, and a little study will show us that it is no unyielding form, but adapts itself to a great variety of circumstances. In its original purpose, and in strict form, it is an action for the value of personal property lost by one and found by another and converted to his own use. But it is not thus restricted in practice, for it is continually applied to every form of wrongful conversion, and of wrongful taking and conversion, and it affords compensation, not only for the value of the goods, but also for outrage and malice in the taking and detention of them. * * *

"Where the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence, or willful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If raw material has, after appropriation and without such wrong, been changed by manufacture into a new species of property, as grain into whiskey, grapes into wine, furs into hats, hides into leather, or trees into lumber, the law either refuses the action of trover for the new article, or limits the recovery to the value of the original article.—*6 Hill, 425; 21 Barb., 92; 23 Conn., 523;* and *38 Me., 174.*

"Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind we shall have but little difficulty in managing the forms of actions so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong,

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he ought not to have been charged with the value of the coal after he had been at the expense of mining it; but only with its value *in place*, and with such other damage to the land as his mining may have caused. Such would manifestly be the measure in trespass for mesne profits."

In *Hill v. Canfield, 56 Pa. St., 454*, trover was brought for the conversion at Pittsburg of three rafts of timber sold by the defendants at Cincinnati, and in which the plaintiffs claimed, and the court below permitted evidence of the price at which the timber sold in Cincinnati as the measure of damages. This was held error. The court say: "If there be cases in which more than compensation may be allowed in trover, and I admit there are, they are in cases of heirlooms, family pictures and the like, taken and converted, and also where there are circumstances of fraud, violence and outrage.

"It has not been an unusual thing in practice to allow damages beyond the actual value of the goods converted, and interest, although the general rule undoubtedly is the value of the goods and interest. This may be exceeded, but not without the element of willful wrong, fraud or outrage."

In *Wood v. Morewood, 3 A. & E., N. S., 440*, where defendant had "won the coals under the closes, *bona fide*, supposing that these were his own," *Parke, B.*, instructed the jury: "If there was fraud or negligence on the part of the defendant, they might give, as damages under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin v. Porter, 5 M. & W., 351;* but that if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly, in the full belief that he had a right to do what he did, they might give the fair value of the coals as if the coal field had been purchased from the plaintiff."

In *Reid v. Fairbanks, 4 J. Scott, 729*, which was an action of trover for a ship, which had been greatly improved after the conversion, *Maule, J.*, said: "It may be that the wrong-doer, who acquires no property in the thing he

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converts, acquires no lien for what he expends on it, and the owner may bring detinue or trover. But it does not follow that, if the owner brings trover, he is to recover the full value of the thing in its improved state. The proper measure of damages, as it seems to me, is the amount of the pecuniary loss the plaintiffs have sustained by the conversion of their ship."

In *Weymouth v. Chicago & N. W. R. W. Co., 17 Wis., 550,* the plaintiff had cut cordwood and piled it upon land which she was in possession of, but which it seems she did not own, with the intention of selling the wood to the defendant. Before the sale was completed the defendant, by mistake, carried the wood to Janesville and there mingled it with other wood, so that it could not be identified. The plaintiff demanded it at Janesville, and failing to obtain it, brought her action to recover damages for the conversion as at Janesville.

At the time of the conversion at Janesville wood was worth at that place four dollars per cord, and afterwards was worth five; while at Farmington, where the wood was first taken, it was worth one dollar and fifty cents per cord. The court held that the plaintiff could not recover the value at Janesville, and after referring to the New York cases, which seem to hold a contrary doctrine, said: "But where the owner voluntarily waives the right to reclaim the property itself, and sues for the damages, the difficulty of separating the enhanced value from the original value no longer exists. It is then entirely practicable to give the owner the entire value that was taken from him, which certainly seems to be all that natural justice requires, without adding to it such value as the property may have afterwards acquired from the labor of defendant."

In *Moody v. Whitney, 38 Me., 174,* the court charged the jury, "that the measure of damages must be the value of the logs when they first became personal property, after the trees were first cut down," and this was held correct, the court saying it was "difficult to perceive why a more rigid

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rule should be applied to a defendant in an action of trover, than to one of trespass."

A contrary doctrine has been held in New York, but it is very doubtful whether the courts in that state will adhere to it should the question again come up. In *Hyde v. Cookson, 21 Barb., 92,* where an action was brought to recover damages for an alleged conversion by defendants of a quantity of hides, the plaintiffs had furnished the hides to one Osborn to tan and manufacture into leather, and return the same to the plaintiffs. Osborn, after partly tanning the hides, failed, and made an assignment of all his property to the defendants for the benefit of his creditors. The defendants took possession of the hides under the assignment, and claimed to own them, and refused to deliver them to the plaintiffs on demand. It was admitted on the trial that the hides had been increased in value two thousand dollars by Osborn, and the court charged the jury that the plaintiffs could recover this increased value. On error the court said: "In applying the rule of damages, it must be remembered that the defendants are not trespassers or wrong-doers. Although the action is in form *ex delicto,* it arises out of a contract, and involves the right to property which came lawfully into the possession of the defendants, and of Osborn their assignor. Whatever has been done to change the property from its natural condition, and to add to its value, has been done in good faith, with the approbation of the owners, and in execution of Osborn's contract with them. This has been broken, and it is in consequence of that breach that the plaintiffs are entitled to recover. When they have judgment for the full value of their interest in the subject matter of the contract, is not that a full satisfaction, without depriving the defendants of the entire value of the labor and expenditures put upon it in good faith? * * * In acquiring title to property by accession, the law makes a distinction between a willful and involuntary wrong-doer. The former never can acquire the title, however great the change wrought in the original article may be, while the latter may.

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* * * The most complete justice will be done to both parties by limiting the plaintiffs' damages to the full value of their interest in the property, giving them the same ample indemnity as they would have had in an action for a breach of the contract."

In *Mathews v. Coe, 49 New York, 57*, the rule which had prevailed in that state, allowing the highest market value up to the time of the trial, was questioned, and a desire expressed by *Ch. J. Church* to consider the question upon principle, and in speaking of the effect of the old rule, the *Ch. J.* said, the difference "is transferred from the defendants to the plaintiff, not because the latter has sustained any such loss by any act of the former, but in obedience to a supposed arbitrary rule established in such cases."

The same question again came up in *Baker v. Drake et al., 53 N. Y., 211*, where *Rapallo, J.*, in discussing this question, says, that "the rule of damages should not depend upon the form of the action. In civil actions the law awards to the party injured a just indemnity for the wrong which has been done him, and no more, whether the action be in contract or tort. Except in those special cases where punitory damages are allowed, the inquiry must always be, what is an adequate indemnity to the party injured, and the answer to that inquiry cannot be affected by the form of action in which he seeks his remedy." This case expressly overrules *Markham v. Jaudon, 41 N. Y., 235*, which permitted the highest market price to be recovered.

See also upon this question, the following: *Heard v. James, 49 Miss., 236*, where it was held that the measure of damages for the wrongful taking or detention of property, is to be determined by the animus of the conversion. If the act was in good faith, upon some supposed right of claim or error, the measure will be the value at the time it was taken; but if the taking or conversion be characterized by malice or oppression, damages may be punitive; and in an action for its recovery, no allowance will be made the defendant for any increased value that may be bestowed by labor or

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skill on the property.—*Riddle v. Driver, 12 Ala., 590; Dresser Manf. Co., v. Waterston, 3 Met., 9; Baldwin v. Porter, 12 Conn., 484; Sedgwick on Damages.*

Finally, it is insisted that this question has already been decided in this court in *Symes v. Oliver, 13 Mich., 9; Final v. Backus, 18 Mich., 218,* and *Grant v. Smith, 26 Mich., 201,* in favor of the plaintiff.

In *Symes v. Oliver* no such question seems either to have been raised or discussed by the court, nor was the question of good faith alluded to by counsel or court in *Final v. Backus.*

In *Grant v. Smith* the defendant in the court below relied upon a tax-deed under which he claimed to have acted in good faith, and he offered the deed in evidence for that purpose, which was rejected. This deed having been rejected, there was nothing in the case tending to show that he had acted other than as a willful trespasser, and such being the case, the plaintiff was clearly entitled to recover the value of the logs at the place to which Grant removed them; and in discussing the objection relating to the measure of damages, the court proceeds upon the theory that Grant in cutting the timber was a mere naked trespasser. The question, however, still remains, was the tax-deed admissible in evidence "to show that Grant, in cutting the timber, honestly supposed that he was the owner of the land, and acted in perfect good faith." I think not, and for reasons other than those there given. It is a notorious fact that tax-deeds are almost universally upon examination found to be invalid, on account of defects not appearing upon the face of the deed. The statute declares, in effect, the deeds to be *prima facie* valid, that is, it shifts the burden of proof to the party claiming against the deed to prove it invalid. But notwithstanding this fact, no person of ordinary care and prudence, with a just regard not only to his own rights and interests, but to those of others, would think of acting upon a tax title, made *prima facie* valid by statute, without having first made a careful examination, outside of and

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beyond the deed, in the proper places, for the purpose of ascertaining whether in fact it was of any validity. If, however, he chose to shut his eyes to the well known fact that a large proportion of such titles turn out to be worthless, and act upon such a deed, regardless of how it may upon investigation turn out, and regardless of the rights of others, he cannot afterwards be permitted to come into court, admit the invalidity of his deed, and yet claim that because he did have such a deed he acted honestly and in good faith. The failure to make such an investigation would be evidence of gross carelessness, for which the party should be held responsible.

Judgment affirmed, with costs.

COOLEY, CH. J., concurred.

GRAVES, J., concurred in the result.

CAMPBELL, J:

I concur in affirming the judgment, upon the ground that the conversion of the logs is set forth in the declaration as having taken place in Michigan, and the only conversion which took place in this state was the original taking and removal of the logs. Upon that basis there is no error in the judgment.

Joseph James v. Bryce Muir.

Sales of goods: Executory contract: Price. Where a contract of sale is executory, the price should be fixed distinctly according to some standard, either of amount, or of market, or of reasonableness, or some other method of ascertainment, in order to make the contract complete and binding upon the purchaser.

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JAMES v. MUIR.

Sales of goods: Price. Where goods are accepted, and nothing has been said about the price, a reasonable price is recognized as correct.

Contract: Statute of frauds: Sales of goods: Price: Memorandum. Where the contract is within the statute of frauds and is executory, the memorandum must name the price, as well where a reasonable price is agreed upon as where any other is; and if the price is left to be arranged by parol, the memorandum will be incomplete.

Statute of frauds: Memorandum: Sales: Reasonable price: Market price. Where, in such case, the memorandum is silent as to price, there is at least no implication of a promise to pay at what may happen to be the market rate, which may not always be a reasonable rate.

Contracts: Statute of frauds: Memorandum: Incomplete instrument. The memorandum in question in this case, which is in the form of a receipt of the price of making and delivering certain timber the year before, and an acknowledgement of certain advances (for which interest is promised) upon certain other specified timber, to be thereafter delivered at a specified time and place free of incumbrances, is held not to indicate a sale at all, by itself, as it fails to show whether the delivery of the timber was to be received as a purchase, or as security, or otherwise; it is held not to be a complete transaction by itself, but only a part of some course of dealings, and to be read and applied by their aid.

Evidence: Contract: Separate instruments: Indivisible transaction. And as the previous dealings between the parties embraced other instruments which belonged with this imperfect memorandum relied upon by plaintiff, and which, construed with it, and in the light of the circumstances, made out a complete and intelligible contract, of which such memorandum was only a part, the admission in evidence of such previous dealings and of these prior instruments was not error.

Submitted on briefs November 3. Decided January 11.

Error to Bay Circuit.

Holmes, Haynes & Stoddard, for plaintiff in error.

Hatch & Cooley, for defendant in error.

CAMPBELL, J:

James sued Muir for a quantity of square timber delivered to the latter in June, 1873. The declaration contains one count on special contract, one for timber sold and delivered, and agreed to be paid for at a reasonable price, and the common counts.

The special count averred a sale of four hundred and twenty-eight pieces of timber, August 6, 1872, then in Arbela, Tuscola county, and an agreement to deliver the same to defendant in Bay City in the spring of 1873 as early as the

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ice and weather would permit; and that defendant, in consideration thereof, agreed and promised to pay the plaintiff therefor, as the same should be delivered at Bay City, the market price of square oak timber of like quality at Bay City aforesaid at the time of the delivery thereof. It then avers a delivery and acceptance of three hundred and sixty-two pieces, and proceeds as follows: "that a portion of said timber so agreed to be delivered, to-wit: sixty-six pieces, the said plaintiff did not deliver with the said three hundred and sixty-two pieces, because the same, without his fault or neglect, while the same was being run to Bay City aforesaid, became scattered, and portions thereof wholly lost, and the said plaintiff refused to deliver the said sixty-six pieces, or any part thereof, because the said defendant wholly failed and refused to comply with and fulfill his said contract in this, that the said defandant refused to pay for said timber, or any part thereof, at a higher or greater price than fifteen cents per cubic foot;" and it then avers the market price to have been twenty-eight cents a foot.

The verdict was at the rate of fifteen cents a cubic foot, for so much as had not been paid for at that rate by advances.

The plaintiff, to make out his case, besides showing a delivery of the timber, introduced the following paper, claiming it to be a contract of sale, and to contain the entire bargain between the parties:

"PORT HURON, August 6, 1872.

"Received from B. Muir the sum of $629 00, C. cur., (six hundred and twenty-nine dollars, C. cur.) being pay in full of all demands for making and delivering square oak timber at Bay City, Michigan, for the year 1872. Also, B. Muir has advanced to J. James $2,077 42 C. c., (two thousand no hundred and seventy-seven dollars forty-two cents, C. c.) on 428 pieces of timber now lying in town of Arbela, Michigan, measured and marked M., which said timber J. James agrees to deliver at Bay City, Michigan, in spring of 1873, as early as the ice and weather will permit, free of

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all incumbrances, to B. Muir. Interest at the rate of 10 per cent. from 1st of April, year 1872, till the timber is delivered at Bay City. J. James agrees to pay and account to B. Muir in spring of 1873 for the within mentioned $2,077 42, C. c., with interest, advanced on said timber to be delivered in spring of 1873 at Bay City, interest at the rate of 10 per cent., C. c., from 1st of April, 1872 till the timber is delivered at Bay City in the year 1873.

"[Signed] J. JAMES."

When this contract was produced, it appeared to have been altered, and the alteration was explained and admitted to have been made at the time of signing; the draft having expressed a rate of payment in the words "at the rate as in 1872," and nothing having been expressed as to interest on advances.

The plaintiff swore that on the delivery of the timber actually brought down in 1873, defendant was not willing to pay for it except at the last year's prices, while plaintiff was unwilling to settle on such terms on account of the arrangement in the writing. An agreement was made to arbitrate, which was not carried into effect. Plaintiff also swore that the balance of the timber was scattered along the river, and could not then be delivered, and had not been.

Upon cross-examination, and in other ways, a considerable amount of testimony was introduced, to which plaintiff objected, and which will be referred to presently.

Plaintiff claims that the agreement of August 6th, 1872, on which he seeks to recover, was in itself a complete and binding bargain, containing every essential of a contract of sale, except the price, which it is claimed appears by implication.

As this is a suit in which defendant and not plaintiff is the "party to be charged," and as the payment of the price is the only thing for which he is chargeable, it may be a question of some importance whether, if this paper is a contract of sale, the statute of frauds is complied with so as to bind him. Where a contract is executory and not executed,

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it is laid down by some authorities, if not generally, that unless the price is fixed distinctly according to some standard, either of amount, or of market, or of reasonableness, or some other method of ascertainment, the contract is incomplete, and the purchaser is not bound. Where goods are accepted, and nothing has been said about the price, a reasonable price has been recognized as correct. In *Acebal v. Levy, 10 Bing., 376*, it was held that where a contract was silent as to price, and there was evidence of a parol agreement as to price, there could be no recovery on a *quantum valebant*, and that a contract in writing was as necessary for a reasonable price as any other. In *Valpy v. Gibson, 4 C. B., 837*, where the court found expressly an acceptance of goods where the invoice was priced, *Wilde, C. J.*, remarked *obiter*, that the omission of price did not necessarily invalidate a contract of sale, and that goods were frequently sold by a contract "which does not specify the price or mode of payment, leaving them to be settled by some future agreement, or to be determined by what is reasonable under the circumstances." In that case the court found everything had been agreed upon, and the discussion was not important, except as intimating that when the price was not mentioned, that element was not thereby fixed by implication at a reasonable or any other rate, but was open to proof. Proof that there was a parol agreement disproves the completeness of the memorandum.—*Benjamin on Sales.*

In the present case it is sufficient to say that according to *Acebal v. Levy* there is at least no implication of a promise to pay at what may happen to be the market rate, which may not be always, as there held, a reasonable rate; and the contract does not support the special count.

As the contract, whatever it may be, becomes important in another point of view, it is still necessary to determine whether it is such an instrument, as with the addition of such help as might come from the implication claimed, is complete enough otherwise to exclude parol evidence of the real nature of the agreement.

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We do not think that the writing, taken by itself alone, indicates a sale at all. It shows upon its face that it is a settlement of some past transaction, in part, and that the defendant had, as early as the April previous, advanced a large sum of money on four hundred and twenty-eight pieces of timber, identified by their marks, which plaintiff was to deliver to defendant free of encumbrance the next spring, when plaintiff was to pay and account for the advances and interest.

There is nothing to indicate for what purpose defendant was to receive or hold this timber, whether as purchaser, mortgagee or factor. It is quite as consistent with a loan upon the security of the timber as anything else. It does show unmistakably that the advances must have been made on some previous arrangement, and not under this paper, because they were to bear interest from April 1st, and the writing is dated August 6th. The only definite conclusion to be drawn from the paper, assuming it to be fully binding as a contract of some kind, is, that it is not a complete transaction in itself, but only a part of some course of dealings, and to be read and applied by their aid. It is merely an agreement to deliver timber to defendant, and at the time of delivery to account for the advances and interest. It is not on its face an agreement which binds defendant to pay any money, or to purchase timber, nor is it complete in itself as an entirely independent contract for any purpose.

Without extrinsic evidence there was nothing to bind defendant under the writing. He distinctly refused, in receiving the timber, to pay any price except one which he insisted was within a former agreement. Plaintiff does not show, unless very indirectly and inferentially, what price he demanded. There was no waiver or assent which could prevent defendant from setting up his actual rights, whatever they may have been.

There was no error, therefore, in holding it competent to show by any relevant testimony all the previous relations

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and dealings of the parties concerning this timber; and the written contracts and arrangements of 1870 and 1871 were relevant for that purpose.

The agreement of September 27, 1871, bound James to make, draw, raft and deliver to Muir all the square oak which "he makes in 1872, or has now made, in the spring of 1872, as early as navigation will permit, free of encumbrances;" and also bound him to use all moneys received, in buying standing timber, or skidding, making and drawing timber or rafting material, or rafting and running the timber to Bay City. It was to average at least sixty-eight feet, and if possible seventy; and it was to be paid for at one hundred and fifty dollars per thousand feet, in the following way: twenty dollars for standing oak, forty dollars for making, ten dollars for skidding, twenty dollars for hauling, and forty dollars for rafting and rafting material and running, and five dollars for towing, and fifteen dollars per thousand when delivered, with an additional five dollars if the timber sold at Quebec for three hundred and seventy-five dollars per thousand.

The present timber was got out, identified and measured, and marked by plaintiff and defendant, before or during the time mentioned in that contract, and was undoubtedly covered by it. It is also beyond question that the failure to deliver it in the spring of 1872 was a breach of that contract, unless excused, and one which might be excused by a change of time.

July 20th, 1872, an account was made up, which brought together in a single statement the timber actually delivered at that date at sixteen cents a foot, and the other expenses of the business, and included a reference to the four hundred and twenty-eight pieces in question, as "measured in the bush," showing an advance of two thousand seventy-seven dollars and forty-two cents, which is the advance referred to in the instrument of August 6th, 1872. Appended to this account is the following document: "July 20th. This is to certify that J. James has settled up in full

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for year 1872, as above account shows. And B. Muir has advanced on four hundred and twenty-eight pieces oak timber, measured in the bush in town of Arbela, two thousand seventy-seven dollars and forty-two cents, Canada currency, which amount J. James agrees to pay or account for in year 1873, when work is commenced on above timber to draw in year 1873, and agrees to deliver said timber at Bay City to B. Muir, interest at ten per cent., Canada currency, from 1st of April, 1872, till the timber is delivered at Bay City. J. James."

This originally did not contain the last clause, which provides for interest, and fixed the price at rates of 1872. The change was made at the time the agreement of August 6th was made, and so as to make the two correspond.

It will be observed that the only essential difference between these two papers as originally drawn is, that the July paper required James to account for the advances as soon as work was commenced on the timber, while the August paper postponed it until delivery of the timber. The change as to price and interest was made at the same time.

Under these circumstances we think the writings all belong together, and that there could be no presumption of a change beyond the writings, until established by distinct evidence. There is no ambiguity whatever in either of these papers, when so construed, while, without this connection, neither of them is complete, and neither would make out a contract of sale, or any other contract on which plaintiff could have a right of action. The evidence that all these papers existed, and that the timber was got out and measured so as to come within the agreement of 1871, is not disputed. The result is inevitable that the instrument of August, 1872, is either a supplement to that of 1871, or else is invalid entirely, for want of a compliance with the statute of frauds, which, whatever may be the rule as to price, requires that the memorandum shall at least show all the other terms of the contract, and especially must show that it is a contract of sale. The parol negotiations were merged in the writing.

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Whatever may have been the reasons which led to the peculiar form of the writing when made, it must speak for itself. And the reference to an advance on the timber, made and to be credited as of a period within the life of, and before any default in, the contract of 1871, precludes the claim that the writing was an entirely new agreement. If the advance had been made at the date of the paper, the case might have stood on different grounds; but the language incorporates the advances as an essential element in the transaction, and as having been connected with some sort of claim upon the timber which was to be respected. The only claim shown by either party at the time the advances were made was the contract of 1871, then in full force, and with that and the paper of August 6th a complete written contract is made out upon the new basis.

The question whether any arrangement was made about the price after August 6th, 1872, was left by the court where the parties had been satisfied to leave it. The jury must have found there was no new bargain made after August 6th.

We do not think it material what was the precise extent of defendant's specific interest in the timber under the contract of 1871, after it was got out and identified and marked, because it would not change or affect any question involved here. If he had any rights at all, and the new contract did not abrogate them, the case was fairly left to the jury.

The judgment must be affirmed, with costs.

GRAVES, J., and COOLEY, CH. J., concurred.

MARSTON, J., did not sit in this case.

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Jane B. Underwood v. Henry Waldron and another.

Disintegration of mortar: Water: Common observation: Matter of science: Opinions: Experts. The effect of water in disintegrating the mortar of a wall is no more a matter of science than is the effect of a running stream in excavating its banks at its angles; and other persons who have had occasion to observe it, as well as masons, may be competent to express opinions upon it.

Evidence: Disintegration of mortar: Water: Opinions as to whence it came. Merely seeing the mortar of a wall disintegrated and destroyed by water, would not alone justify an expression of opinion whence the water came; but if there were other facts indicating that the water came from a particular direction, or must have been applied in a particular way, it would be competent, along with the evidence of the indications themselves, to admit opinions upon them.

Evidence: Opinions upon facts: Disintegration of mortar. The opinions, however, in such case should be confined simply to the very facts which came under the witness' own observation, and the questions put to elicit such opinions should be framed with that view, and be calculated to exclude the influence of every thing else upon the reply.

Trespass: Injury to another's property: Wrongful acts: Contributory negligence. The fact that the plaintiff built her house upon wet and springy soil, and allowed water to accumulate and stand in her cellar, and thereby contributed to the disintegration of the mortar, whereby her walls were destroyed, cannot operate, through the aid or influence of the doctrine of contributory negligence, to shield the defendant from liability for any injury which his wrongful acts may have inflicted.

Adjacent proprietors: Enjoyment of one's own: Injury to another. All rules concerning the relative rights and duties of adjacent proprietors must have for their basis the concession to every one of the right to an undisturbed enjoyment of his own, so long as he does not make use of it to the injury or annoyance of others.

Joint duty: Neglect: Injury. Where an injury results from the neglect of a duty which is common to both parties alike, neither can maintain an action against the other for such injury, which was the result as much of his own, as of the other's negligence.

Adjoining proprietors: Towns: Good neighborhood: Negligence. The respective duties which adjoining proprietors in a town, mutually improving their property, owe to one another, are those only which the requirements of good neighborhood in such a town would impose, *i. e.*, each must use all due care and prudence to protect his neighbor, but is not bound at all events and under all circumstances to protect him; and any injury that may result notwithstanding the observance of proper caution, must be deemed incident to the ownership of town property, and can give no right of action.

Injury: Accident: Extraordinary circumstances. Injuries from extraordinary or accidental circumstances for which no one is in fault, must be left to be borne by those on whom they fall.

Adjoining proprietors: Buildings: Eaves-trough: Water from roof: Injury to adjoining building. Where two buildings are so situated that the water from the roof of one can only be prevented from flowing against

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and injuring the other by an eaves-trough attached to both, though the consent and co-operation of the owner of the building receiving the injury may be necessary, yet the duty of affirmative action is on the owner of the other building, and he may not lie by and see the water from his roof destroy his neighbor's wall, and rely for his protection upon the passiveness of his neighbor.

Heard January 4 and 5. Decided January 11.

Error to Hillsdale Circuit.

This was an action of trespass on the case brought by plaintiff in error against defendants in error for injuries to the walls of her brick building, caused by water flowing from defendants' roof against it. The trial was by jury, and the verdict for defendants.

A. Dickerman, Charles S. May and *G. V. N. Lothrop,* for plaintiff in error.

E. L. & M. B. Koon and *George A. Knickerbocker,* for defendants in error.

COOLEY, CH. J:

I. Some of the questions which were put to the witnesses called by the plaintiff, in order to show that the injury to her wall must have been caused by water flowing from defendants' building, and which were ruled out by the circuit judge, seem to have been unobjectionable, and their rejection was error, unless the same witnesses were allowed to answer other questions of corresponding import. This seems to have been the case in some instances. We do not deem it important to examine the several questions in detail, but as the case is to go back for a new trial, it will be sufficient to lay down the general principle which should govern if similar evidence should again be offered.

The case was one of injury to the foundation walls of a building, some portion of which it would seem to have been conceded on both sides must have been caused by water. The plaintiff's case was, that this water was thrown upon her walls by the roof of the defendants' building constructed

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adjoining, with only some four inches between them. The theory of the defendants seems to have been, that the water which caused the injury was from the wet and springy soil on which the building stood, and from an accumulation that, for a time at least, had been allowed in the plaintiff's cellar. In support of her own view of the case the plaintiff called masons and others, and desired them to testify, from their knowledge, experience and observation, whether the injury to the building was caused by water from the inside, or by water poured from above upon the building on the outside. We say this was what she appeared to seek by the questions proposed, though none of them were put exactly in this form, and some of them were probably objectionable, because comprehending something more which was not properly within the scope of a question calling for mere opinion.

The general inquiry which was proposed to be gone into did not call for opinions on matters of science, but on matters on which any man who has observed the effect of water upon walls might be supposed to be competent to express an opinion. The effect of water in disintegrating the mortar of a wall is no more a matter of science than is the effect of a running stream in excavating its banks at its angles; the effect is one that any person may have occasion to observe, and that persons in all occupations may be competent to express opinions upon. One man's observation and experience may make his opinion more valuable than that of another, but this may or may not be because the observation and experience have been connected with some particular employment.

Whether there will be in any particular case any marks or indications such as fairly can justify opinions, is a question which only the facts in that case can determine. If a man only sees the plaster of a wall disintegrated and destroyed by water, with nothing but the disintegration to indicate from whence the water came, it is obvious there can be no basis for an opinion on that subject, because water coming from any source must or may cause the result he

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sees. To ask him, then, his opinion whence the water came, would be unwarranted, because plainly he can have no opinion except such as he must form on facts or opinions communicated by others, or derived from something besides that which he is supposed to be giving an opinion upon. But if in addition to the fact of injury, there are other facts indicating that the water came from a particular direction, or must have been applied in a particular way, it would be unreasonable to exclude opinions upon those indications. True, the indications themselves ought to be proved; and it is quite true also, that the jury are authorized to draw their own deductions from them; but no witness can fully present the appearances as they were before his eyes; and to take his testimony of what he saw, without his opinion, would seldom prove fully satisfactory, and would often be misleading. Indeed, in many cases it is difficult to separate a description of the indications from an opinion upon them; nor is a witness always expected to do so. If a man were to come upon the track of a recent rain or snow storm, he would hardly be stopped in giving an account of it as a witness if he were to say among other things that the storm appeared to have come from a particular direction; because such a storm, as every one knows, must usually, for a time, leave behind it some very conclusive indications of the direction it had taken.

Of course in any such case it should appear that the witness had some basis of observation on which to justify his opinion; but when he has stated the peculiar facts, his opinion may properly be called for. When called for, however, it should be confined to an opinion upon the very facts which have come under his observation, and the questions intended to elicit it ought to be framed with that view, and be calculated to exclude the influence of every thing else upon the reply. A man may find A's wall injured and conclude that B committed the injury, because he knows B and A are enemies. Now, as the law will permit no one to testify to his opinion what B would be likely to do because

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of his hatred, neither will it permit a witness, in testifying to an injury A has received, to take this enmity into account in judging whence the injury came. The enmity as an independent fact may in some cases be put before the jury, but the witness must discard it from consideration when testifying. We speak of this with a view to more caution on a new trial, as we think some of the questions put before were carelessly framed, and did not by their terms necessarily exclude from the mind of the witness all considerations but those connected with what he had observed and seen.

II. The circuit judge seems to have thought the doctrine of contributory negligence had or might have an important influence in determining the rights of the parties to this cause. If we do not misapprehend some of his rulings, he intended to give the jury to understand that if the plaintiff was negligent in constructing her building upon wet and springy ground without sufficient foundations, or in allowing water to stand in her cellar, and this negligence contributed with that of defendants' in allowing the water to be thrown from their building upon hers, to injure the latter, then for this injury, because of the contributory fault on her part, she can have no cause of action against them. This, as it appears to us, was the idea intended to be conveyed by some of the instructions given, and in this way he was probably understood by the jury.

It seems hardly necessary to say that this is wholly a misapplication of the law of contributory negligence. It is no negligence, in any proper sense of the term, when one erects a building on foundations not calculated for great endurance. If the building is on his own land, and for his own use, he has a perfect right to erect it so that it shall stand for a single year only, if he shall please to do so. His doing so can give no other person, not endangered by the building, a right to invade his premises and to destroy, or assist in the destruction of the building in a less time. No one can question his right to allow water to stand in his cellar, unless by so doing he creates a public nuisance, or a

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private nuisance to his neighbor. The injury thereby caused is his own concern, and a neighbor has no more right to add to it by a wrongful act of his own than he would have to commit a like injury upon the premises of one who took better care of his buildings. Any other doctrine would detract greatly from the privileges and rights of private ownership, and place owners of property in many cases at the mercy of adjacent proprietors. The poor man whose roof was found going to decay might have it destroyed without remedy by the heedlessness of his neighbor, and the man who had built of wood might be set at defiance by one who had carelessly destroyed his building, because he was negligent in not building of brick or stone. It is impossible to predict where such a doctrine would lead, but it is certain that it would end in destroying the sanctity of private property.

All rules concerning the relative rights and duties of adjacent proprietors must have for their basis the concession to every one of the right to an undisturbed enjoyment of his own, so long as he does not make use of it to the injury or annoyance of others. The durability of his structures concerns no one else, so long as they are not dangerous, and do not become or create nuisances. If, as they stand or are used, they will stand for five years, the wrongful act of another party which causes them to fall in two is as effectual to give a right of action as if the construction had been of the most substantial character. The damages recoverable would manifestly be less, because the injury from the wrongful act would be less; but the right of action would be as complete in the one case as in the other.

What the plaintiff complains of here is, that defendants by their negligence threw water from their building on her wall and injured it. If the injury came from this source, the doctrine of contributory negligence might be applicable provided the plaintiff as well as the defendants had been neglectful of some duty in protecting her building against the water flowing from theirs. If, for instance, the gutter

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prepared for carrying the water off had been one which, by agreement or otherwise, it was the joint duty of the adjacent proprietors to keep in repair, neither of them would be suffered to maintain an action against the other for that which was the mutual fault of both. To this extent the rule is perfectly clear, and also perfectly reasonable; but it does not go to the extent of giving one man a right to create a nuisance on his neighbor's land because the neighbor himself does not use his premises to the best advantage.

III. But although the defendants are liable if they have wrongfully thrown water upon plaintiff's building to her injury, we do not think their duty in the premises was coextensive with the claim in that behalf set up on the part of the plaintiff. That claim seems to be that the defendants were bound, at all events and under all circumstances, to keep the water that flowed from their building from falling upon the plaintiff's land.

There is some strong language in the case of *Rylands v. Fletcher, Law R., 1 Exch., 265; S. C., Law R., 3 H. L., 330,* as to the duty of one man to protect another against water flowing from his reservoir; but the case had no analogy to this in its facts, and the governing principle should perhaps be different. The injury in that case was from the bursting of a reservoir into which defendant had gathered water on his grounds; and it was thought that under the peculiar circumstances, which need not here be mentioned, the party should, at his peril, have kept the water from inflicting injury to his neighbors. That was an exceptional case, but this was the ordinary case. Here are adjoining proprietors in a town, mutually improving their property with buildings. This is their right, and the policy of the law favors it. Neither of them is under obligation to permit his lot to remain vacant, because putting up a building will possibly throw water upon his neighbor.

The respective duties of the parties to each other are those which the requirements of good neighborhood in such a town would impose. Each must so use his own as not

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to injure his neighbor. But this means only that he shall use all due care and prudence to protect his neighbor; not that he shall at all events and under all circumstances protect him. Any injury that may result notwithstanding the observance of proper caution, must be deemed incident to the ownership of town property, and can give no right of action.

Undoubtedly the defendants were bound to put proper eaves-troughs or gutters upon their building, and to keep them in proper order, if the neglect to do so would be likely to injure the plaintiff. But if they did this, and were guilty of no negligence in that regard, the plaintiff can have no legal complaint against them. Injuries from extraordinary or accidental circumstances for which no one is in fault, must be left to be borne by those on whom they fall.

IV. Of the other points taken by the plaintiff in the brief in this court, we think the first and second not well taken. The question put to the witness Campbell was not wholly foreign to the case, and might with propriety have been allowed, though a judgment would not be reversed for an error—if it was one—so trivial. We are not prepared to say that there was any error in allowing the questions which were put to Sampson. The ninth request* of the defend-

*The defendant's 9th request, as modified and given, read as follows, the modifications added by the judge being printed in italics:

"If the jury find from the evidence that the building of defendants had been erected about eighteen years prior to the erection of plaintiff's building, which was placed within a few inches of the eaves of defendants' building, and so close to the same that an eaves-trough to protect the plaintiff's building would *necessarily* have to be fastened to both buildings *in order to prevent the injury complained of*, then the plaintiff was bound to such care and prudence, under the peculiar circumstances of the case, as a reasonable, prudent person would exercise to protect his property; and defendants were entitled to good faith and fair dealing on the part of the plaintiff, and if she neglected to offer to co-operate with defendants in the erection of a proper eaves-trough or to request that such trough be erected, or neglected to do what good faith and fair dealing required of her under the peculiar circumstances of the case, then, *even if you find there was no other proper way to avert the injury complained of, than the erection of a valley attached to both buildings*, the defendants could not be held guilty *merely for a neglect on their part to erect such valley.*"

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ants, as modified by the judge and then given, was objectionable in assuming that the plaintiff was to be the moving party in the precautions taken to protect her premises against water from defendants' building. Her consent and coöperation might possibly have been necessary, but the duty of affirmative action was on the defendants. Still, the action of the plaintiff, or her non-action, might have an important bearing on the question of negligence under some circumstances. The question of what is customary in these cases is very important, and juries ought not to apply such strict rules as may lay the foundation for perpetual broils and litigations over unintentional and insignificant injuries.

The judgment must be reversed, with costs of this court, and a new trial ordered.

The other Justices concurred.

Moses Robens v. Frances L. Videto.

Remedy: Error: Certiorari. Error, and not *certiorari*, is the proper remedy to bring up for review an order of the circuit court in dismissing, on motion, for want of jurisdiction, a writ of *certiorari* from that court to a circuit court commissioner for the review of proceedings under the statute to recover possession of land.

Heard January 5. Decided January 11.

Certiorari to Jackson Circuit.

This writ was sued out to review the decision of the circuit court in dismissing a writ of *certiorari* from that court to a circuit court commissioner for the review of proceedings under the statute to recover possession of land. The ground of the dismissal was, want of jurisdiction for the reason that the writ was authorized by one circuit court commissioner of the county to remove to the circuit a judgment rendered by another commissioner of the county.

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The correctness of this ruling is one of the questions raised, and it is also urged that the court erred in hearing and determining the motion to dismiss, *ex parte*, and without any showing of notice to counsel for plaintiff in *certiorari*, at a time when, by the rules of court, the case was not triable without special notice.

Calvin C. Burt, for plaintiff in *certiorari*.

No counsel appeared for defendant in *certiorari*.

THE COURT held that the questions raised were such as should be raised by writ of error.

Writ dismissed.

David E. Harbaugh v. The People on the relation of Edward V. Cicott.

Special questions to jury: When answers inconsistent with general verdict. As to special questions to the jury, where a verdict is given for the party holding the affirmative of the question at issue, and the jury in answer to special questions submitted to them negative a fact, or say they are unable to find it, which the party holding the affirmative must establish in order to entitle him to a verdict, or if where a verdict is given for the other party, they find in answer to such questions facts sufficient to establish the issue, then in either case the special finding is inconsistent with the verdict, and will control it.

Special questions to jury: Statute construed: What proper questions to be submitted. Proper interrogatories upon particular questions of fact material to the issue, and involving legal consequences which would have a controlling force in reaching a conclusion, should upon request be submitted to the jury; and though the jury cannot be compelled to answer them, a failure to answer or find any affirmative fact essential to sustain the verdict will have the effect to nullify the verdict and result in a mistrial.

Elections: Special questions to jury: Number of illegal votes. Where in an election controversy it was conceded the respondent by the official returns had a majority of one, and the relator sought to overcome this by showing that certain votes cast for the respondent were illegal, and the respondent in turn undertook to show that illegal votes were cast for the relator, it is held the parties had a right to have proper questions, proposed for the purpose of ascertaining whether certain alleged illegal voters voted, for whom they voted, and whether they were legally entitled to vote, submitted to the jury, and that their rejection was error.

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HARBAUGH *v.* CICOTT.

Elections: Evidence: Appearance of folded ticket: Source of information. The testimony of a witness that two men voted who were not registered voters, that he saw their ballots as they were handed by the voters to the inspector and that he is *confident* they were straight democratic tickets, is not within the ruling in *16 Mich., 312*, as to testifying from the appearance of a folded ticket, where it does not appear that was his only source of information.

Special questions to jury: Admitted facts. The admission of a fact upon the trial does not preclude the opposite party from putting a special question requiring the jury specifically to find the fact.

Elections: Special questions to jury: Registry. It being shown that a certain person named, who was claimed to be an illegal voter, voted at a certain place, it was competent to ask the jury to find specially whether he was duly registered in that ward, since if duly registered he was *prima facie* entitled to vote.

Special questions to jury: Application of legal principles to the evidence. It is not a valid objection to special questions to the jury as to whether a named person was "duly registered," or was a "legal voter," and "if not, why not," that it requires them to pass upon questions of law; the application of legal principles to the evidence in the case, and to draw conclusions therefrom, is not beyond the province of the jury.

Special questions to jury: Inconclusive inquiries. Questions which are inconclusive, and which, no matter how answered, would not be inconsistent with the verdict, may properly be withheld from the jury

Special questions to jury: Policy: Legislative questions. The question of the wisdom or propriety of permitting special questions to be submitted to the jury, is one to be addressed, not to the courts, but to the legislature.

Electors: Voting twice: Mistake: Illegal votes. One who has first by mistake voted in the wrong precinct, and upon discovering his mistake has requested and procured the inspectors to withdraw and cancel a ballot such as he asserted he had voted, has no right afterwards to vote again in his proper precinct; and his second vote is illegal.

Inspectors of election: Canceling ballot. Inspectors of election have no authority, on the assertion of one who claims to have voted by mistake in the wrong precinct, to withdraw from the ballot box and destroy a ballot which he identifies as the one, or similar to the one he had voted.

Electors: Registry: Presumptions: Residence. The presumption of qualifications as a voter, arising from the registry, covers all the essential requisites to a right to vote, including residence within the ward the necessary time.

Residence: Temporary absence: Intention. The temporary absence of a person or his family, though extending over a series of years, does not necessarily, without regard to his intentions, make him lose his residence, or deprive him of his rights as an elector.

Elections: Jury trial: Special questions: Failure to answer: Mistrial. In an election controversy where the issue turned on the question whether illegal votes had been cast, evidence having been introduced of illegal votes on both sides, the answer of the jury to special questions as to how many illegal votes were cast for each, that they do not know, is inconsistent with their general verdict against the party who had received according to the official returns the majority of the votes, and demonstrates that there has been a mistrial.

Heard January 5 and 6. Decided January 11.

Error to Wayne Circuit.

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HARBAUGH v. CICOTT.

George H. Prentis and *Alfred Russell,* for plaintiff in error.

J. W. Romeyn, E. W. Meddaugh and *Theodore Romeyn,* for defendant in error.

MARSTON, J:

The relator filed an information in the nature of a *quo warranto* to inquire by what warrant the respondent held or exercised the office of police justice of the city of Detroit.

A number of questions* were submitted to the jury upon which they were instructed to find specially, and some questions the court would not permit to be submitted to the jury. Error is assigned upon this refusal; also upon the refusal of the court to render judgment for the respondent upon the evidence of his official majority and the failure of the

* The questions submitted on behalf of the relator were as follows:

1. Was Tisler's ballot, or one just like it, afterwards withdrawn from the ballot box and destroyed by the inspectors, and not included in their returns?
2. Did Robert McClatchey's family reside in Royal Oak at the time of the November election, 1873, and had his family resided there for several years immediately preceding said election?
3. Was he a married man?
4. Did he reside with his family, except while doing business in Detroit during the week?

These questions were each answered, "*yes.*"

The questions proposed by respondent were as follows:

1. Did Nicholas Tisler cast two ballots at the election in November, 1873, in the seventh ward of Detroit, and both said ballots for Edward V. Cicott for police justice?
2. Did Andrew Lehner cast a vote for said Cicott in the second district of the tenth ward of said city at said election?
3. Did a man calling himself Moran vote for said Cicott in said second district?
4. Was said Moran registered?
5. Did a man whose name is unknown, and who was not registered, the inspectors not being able to find his name on the registry, vote for said Cicott in said district?
6. Did two men personating James Flanigan and Daniel Eastman, illegally vote for said Cicott in the third ward?
7. Did Robert Smith vote for said Cicott in the third ward?
8. Was he registered?
9. Did James Melvin vote for said Cicott in the third ward?
10. Was he registered?
11. Did C. McKinney vote for said Cicott in the third ward?
12. Was he registered?

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jury to answer how many illegal votes were cast for either party, and also upon the charges and refusals to charge the jury.

The statute under which questions are submitted to the jury has been before this court several times. In *Crane v. Reeder, 25 Mich., 316,* it was said: "No question should have been put to the jury which was not material to the inquiry upon which they were to enter; and upon every material question one party or the other would have held the affirmative, and unless he made out his case upon it by the evidence, should have had a finding against him upon it. Every fact essential to a party's case or defense which he fails to prove, is considered as not established, and must be negatived in the conclusions of the jury; it will not do to ignore it."

13. Did Alfred Davis vote for said Cicott in the third ward?
14. Was he registered?
15. Did Robert McClatchey have his regular boarding house in the third ward of Detroit?
16. Was he duly registered in said third ward at the time of said election?
17. Did Henry Clay, George Washington and old man Linn vote at said election for said Harbaugh in the first precinct of the sixth ward?
18. Were their names on the poll list of said district?
19. If you find that they voted, under what names respectively did they vote?
20. For whom did George Galstu vote at said election for police justice?
21. Had Thomas Ward any intention of abandoning his residence in the third ward and taking up his residence in Windsor and not returning?
22. Was Thomas Ward's name on the poll list of said third ward at said election?
23. Did Charles Flood, William Means and Robert Gimble vote in the second ward at said election?
24. Were either of them on the poll list?
25. If you find that they voted for police justice, for whom did they vote?
26. If you find they voted, under what names respectively did they vote?
27. For whom did William Bruce vote for police justice?
28. Was he a legal voter?
29. If not, why not?
30. Did William Stimson, Jack Law and Robert Henkle vote in the second ward at said election?
31. If they did vote, for whom did they vote respectively for police justice?

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In *Sheehan v. Barry, 27 Mich., 224*, it was held that a question the answer to which, whether in the affirmative or negative, would not be inconsistent with the general verdict could not, therefore, affect the verdict, and ought not to be submitted. In *Dubois v. Campau, 28 Mich., 306*, it was said that the questions to be submitted are required to be particular questions of fact which involve legal consequences, and which would have a controlling force in reaching a conclusion; and in *Frankenberg v. First National Bank, supra, p. 46*, it was held that questions, the answers to which would be inconclusive, should not have been submitted.

Now, while it may be very difficult to lay down a general rule so clear that he who reads need not err, yet we think it is not at all difficult in the light of the above decis-

32. Are their names on the poll list?
33. Who gave William Bruce the ballot which he voted? William Enos, Arthur Gore or Thomas Gore?
34. Where was said ballot given to said Bruce?
35. If Jack Law voted, under what name did he vote?
36. Did said Law vote the next man after William Bruce, as stated by Thomas Gore?
37. Did Henry Atkinson, George Jarvis, William Stimson and John Crawley arrive in Detroit with Robert Walsh from Cleveland on Sunday before election, as stated by said Walsh?
38. Did they vote in the second ward at said election?
39. Were their names on the poll list of said second ward?
40. If they voted, under what names did they respectively vote?
41. If they voted, for whom did they respectively vote for police justice?
42. How many illegal votes were cast for Mr. Cicott?
43. How many illegal votes were cast for Mr. Harbaugh?
44. Was William Bruce the adopted son of Mrs. Bruce of Malden?
45. Who were his parents, and what were their names?
46. Where was William Bruce born?
47. How long had William Stimson lived in Detroit?
48. State whether he was a native or foreign born citizen?
49. If he was foreign born, had he his second or full papers of citizenship?

Objection being made to those numbered 3, 4, 5, 6, 16, 28, 29, 33, 34, 36, 37, 44 and 45, the court declined to submit them.

1, 2, 21 were answered "*yes;*" 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 22, 23, 24, 30, 32 and 39 were answered "*no;*" 19, 25, 26, 31, 35 and 49 were not answered at all; 20, 27, and 41 were answered "*Harbaugh;*" 38 was answered "*all but Stimson;*" 40, 42, 43, 47, and 48 were answered, "*don't know;*" 46 was answered, "*Canada.*"

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ions, to determine whether a given question should be submitted to the jury or not, and if submitted, what the effect of the answer, or failure to answer, upon the verdict would be.

Upon the trial of a cause there is always one or more questions at issue and upon which one side or the other holds the affirmative. If the jury finds a verdict in favor of the party holding the affirmative, and in answer to certain questions submitted to them, answer in the negative, or say they are unable to find a fact which the party holding the affirmative must establish in order to entitle him to a verdict, then the answers are inconsistent with their general verdict, and would control it. Or if they should find a verdict in favor of the party not holding the affirmative of the issue, and yet in answer to questions submitted to them should find that the party holding the affirmative had established the issue, here again the special finding would be inconsistent with their general verdict, and would control it.

Thus, by way of illustration, an action is brought upon a promissory note against the maker and endorser. An affidavit is filed denying the execution of the note, and upon the trial it is further claimed that the note, if executed, has been paid. Here the plaintiff, in order to recover, must prove the execution of the note, and the further fact that it was duly protested and notice given the endorser in order to hold him. The jury render a verdict for the plaintiff for the amount of the note, and in answer to questions submitted find that the note was forgery, or they are unable to agree whether the alleged maker ever executed it. Such a finding would be inconsistent with their verdict. Or should they find that it was properly executed, but was not protested, or that no notice of protest was given the endorser, or that they don't know whether notice was given the endorser or not, in either case the answer would be inconsistent with their verdict. Should they, however, render a verdict of no cause of action, and in answer to questions submitted find the note properly executed, duly protested and notice given, and further say that the note had not been

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paid, or that they did not know whether it had been paid or not. Here again the special finding would be inconsistent with the general one. There would in either case be a failure to agree upon and find one or more facts essential to sustain their general verdict, and which properly they should have found before they could render such a verdict as they did. The parties have a right, therefore, to test the correctness of their general verdict in this way. And one or more interrogatories upon particular questions of fact material to the issue, and involving legal consequences which would have a controlling force in reaching a conclusion, may be submitted to the jury, and the court cannot decline, when requested, to submit such questions. The jury cannot be compelled to answer them. A failure to answer or find any affirmative fact essential to sustain the verdict will have the force and effect to nullify the verdict and result in a mistrial.

What then was the issue in this case? Evidently the question was, who received the greater number of legal votes. It was conceded that according to the official returns the respondent had a majority of one. The burthen of overcoming this was upon the relator. He undertook to do this by showing that certain votes cast in favor of the respondent were illegal, and in this way reduce the number of legal votes which he received. The respondent undertook to show that certain illegal votes were cast in favor of the relator, for the purpose of establishing the fact, that notwithstanding the illegal votes, if any, which he received, yet by deducting the illegal votes given the relator, he, the respondent, would still have a majority. The parties therefore had a right to have certain questions submitted to the jury for the purpose of ascertaining whether certain alleged illegal voters voted at said election, for whom they voted, and whether they were legally entitled to vote.

In the light of what has been said, we will now examine some of the questions raised in this case.

The third, fourth, fifth, sixth, sixteenth, twenty-eighth

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and twenty-ninth questions proposed by the respondent should have been submitted to the jury. The third, fourth, fifth and sixth questions may be considered together. These questions were proposed for the purpose of having the jury say whether certain persons illegally voted for the relator as the evidence given tended to show. It is claimed, however, that as to the third, fourth and fifth questions, there was no evidence tending to show that the persons referred to therein voted for the relator, and therefore the court properly refused to submit these questions. The record in reference to this question was as follows:

"The testimony aforesaid, tending to show that two men voted for the relator in the second precinct of the tenth ward, was substantially as follows:

"One of the inspectors of election in that precinct testified that two men voted for the relator, whose names are not found registered as voters; that he did not know their names, but believed the name of one of the men was Moran, and that he saw the ballots as they were handed by the voters to the other inspector, and was confident they were straight democratic tickets. The poll list for that precinct was produced, and the name of D. Moran appeared as having voted at that election. His name did not appear on the registry. This was all the evidence in respect to these votes."

We are referred to the case of *The People v. Cicott, 16 Mich., 312–313*, in support of the position of relator's counsel. We are satisfied with what was there said, and have no intention or desire of departing from it. But it does not appear in this case that the inspector who testified had no other knowledge of how the parties voted except from the appearance of a folded ticket. He testified he was *confident* they were straight democratic tickets, and it is conceded relator's name was upon the straight democratic ticket. How the witness acquired his confidence, does not appear. We cannot, nor could a jury, assume it was from the appearance of the ballot only. The evidence in this form was

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competent and admissible; and if the relator's counsel did not consider it necessary to inquire further concerning the source of this witness' information, they ought not now to complain.—*Bissell v. Starr, 32 Mich., 297.*

As to the sixth question, it is said relator's counsel upon the trial admitted the two persons there inquired about illegally voted for the relator, and therefore there was no necessity for submitting the question to the jury. We are not satisfied that this position is correct. The fact having been admitted would have relieved the jury from all difficulty in answering the question, but as it was the duty of the jury to find from the evidence and admissions the entire number of illegal votes cast for the relator, the respondent had the right to have the jury pass upon and answer the question notwithstanding the admission.

It was claimed by the relator that Robert McClatchey voted for respondent, although he was not legally entitled to vote in the city of Detroit, not being a resident thereof. The sixteenth proposed question, viz.: "Was he, McClatchey, duly registered in said third ward at the time of said election?" was material, because, if duly registered, then he was *prima facie* entitled to vote. This question we will consider farther when we come to the instructions given the jury as to McClatchey's residence and right to vote.

There was another objection urged against the form of this question, which was also urged against the twenty-eighth question, "Was he, William Bruce, a legal voter?" and the twenty-ninth, "If not, why not?" viz.: that to ask whether a party was "duly registered," or was a "legal voter," was asking the jury to pass upon a question of law, and to give their reasons for coming to the conclusion. It is true an answer to the sixteenth and twenty-eighth questions involve the application by the jury of legal principles to the evidence in the case, and a conclusion therefrom; but it does not thereby follow that the questions are improper, or that the jury could not answer them.

The legality or illegality of certain votes was the very

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question which the jury was empanelled to decide. To enable them to do this, evidence was submitted to them, the court was to give them the law applicable thereto, and from the law and the evidence thus submitted they were to find the fact. In finding a verdict for the relator, they must have found that certain persons who voted for the respondent were "illegal voters," in order to overcome the majority with which he started. Now if they were competent to do this, in order to find a general verdict, we fail to see why they were any less competent to find the same fact in answer to a question. If the jury were incompetent to answer such a question, then they were for the same reason incompetent to find a general verdict, but should have found the facts only, and left it to the court to have applied the law thereto and render judgment accordingly. This has not been contended. Nor was there any objection to asking the jury, in case they found Bruce was not a legal voter, to give their reasons for such a conclusion, so that the court as matter of law might determine the sufficiency of the same. If Bruce was registered and voted, the presumption follows that he was a legal voter, and facts sufficient to overcome this presumption must have been found by the jury in order to throw out his vote.

The other questions proposed, and not submitted to the jury, were inconclusive, and no matter how answered would not have been inconsistent with the verdict, and were properly withheld from the jury.

The wisdom of thus permitting questions to be submitted to the jury was assailed, but as that is a matter to be addressed to the legislative, and not the judicial department, we may pass it without comment.

Evidence was given tending to prove that Nicholas Tisler voted twice by mistake; that immediately after depositing the first ballot he called the inspectors' attention to the fact that he voted by mistake, having recently removed from that precinct, and at his request his ballot was withdrawn and canceled. The jury found that he voted twice for the

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relator, and that his first ballot, or one just like it, was afterwards withdrawn from the ballot box, and destroyed by the inspectors, and not included in their return. And it is claimed that this cured the error of his voting twice, so that the second vote should be permitted to stand.

The statute requires both ballots to be destroyed where they are so folded together as to present the appearance of a single ballot, thus depriving the person of any vote, and this irrespective of the fact whether they were folded together by mistake or intentionally. It is very apparent that should the course adopted in respect to Tisler's vote be approved, it would open the door to the grossest frauds. The inspectors are not permitted to examine the ballots as handed to them, so that where they are folded they have no means of ascertaining how a person votes, and after the ballot is once deposited they have neither the opportunity nor authority to investigate the matter, and if they should act they would be entirely dependent upon the statement of the voter. If therefore a person should vote against the relator, and after his ballot was deposited in the box, claim he had voted in that precinct by mistake, and ask to have his ballot destroyed, asserting that he had voted for the relator, and not against him, and a ballot with the relator's name thereon should thereupon be withdrawn and canceled, the effect would be equivalent to two votes against him. An election likely to be closely contested could in this way be very materially affected. Tisler having once voted, whether legally or not, had no right to vote again, and his second vote should not be counted.

It appeared that Robert McClatchey voted in the third ward, and that his name appeared upon the register and poll list. He was therefore *prima facie* a legally qualified voter and entitled to vote in the precinct and ward where he was registered. This presumption covers and includes everything necessary to make him a qualified voter. Residence in Detroit the necessary time is one of the essential requisites to a right to vote. The presumption covers this, and the burthen of proving such facts as would show that

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he never was a resident of Detroit, or that if he ever was he had lost his residence, was upon the party asserting the contrary. There was no evidence given tending to show that he never had been a resident of Detroit; but evidence was given tending to show rather that he had lost such residence. There was evidence given tending to prove, and the court instructed the jury, "that if they should find that Robert McClatchey's family resided at the time of said election at Royal Oak, and had resided there for some years previous, and that he was in the habit of going there Saturday night and spending Sundays with them, though himself employed and living in Detroit during the week, he was not entitled to vote in Detroit."

The trouble with this charge is that it ignores entirely the question of the elector's intention in taking up or fixing his residence. Yet the intention of the party is one of the most important inquiries involved in such a question. No one will contend that a party loses his residence and rights as an elector because himself and family temporarily reside in some other city, township or ward, even although such temporary residence should extend over a series of years. The intention of the party, coupled with certain other facts, is what governs.

The jury, in answer to the forty-second and forty-third questions, say they don't know how many illegal votes were cast for either Mr. Cicott or Mr. Harbaugh. The bill of exceptions shows that the question as to the number of illegal votes cast for the respective parties was the one presented to the jury and upon which they were asked to find. If they were unable to agree upon and answer these questions, the effect would be a mistrial. The official majority of the respondent could only be overcome by a finding of the jury showing the number of illegal votes which each party received, upon such a state of facts as existed in this case.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

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Franklin Twiss v. Leander George.

Equity jurisprudence: Specific performance: Parol contract: Performance. An arrangement between a step-son just come of age and about to leave home and set up for himself, and his step-father, that if the former would stay with the latter and work the farm and take care of the family, he should have in consideration thereof a deed of one-half the farm, which is shown by the evidence to have been a distinct and definite agreement as to the land and the consideration, and not a mere vague expectation, is sustained and specifically enforced after a substantial performance of the consideration.

Evidence: Representatives of deceased person: Matters equally within knowledge of deceased. The statute which in controversies with the representatives of deceased persons precludes evidence of matters equally within the knowledge of the deceased, does not apply to controversies with third persons acting in their own right as purchasers during the life of the deceased, and not taking by any *post mortem* estate.

Equity pleading and practice: Suit at law: Election: Bar. The fact that complainant, after conveyance of the land to a third person, brought attachment and levied on the land for such of his advances and expenditures as were not outlawed, where the attachment has since abated by the death of the defendant therein, will not avail as a bar to his bill, filed to set aside such conveyance on the ground that the grantee therein took as trustee subject to complainant's beneficial interest, at least not where such defense is not clearly and directly set up in the answer.

Submitted on briefs January 6. Decided January 11.

Appeal in Chancery from Branch Circuit.

John B. Shipman, for complainant.

Upson & Thompson, for defendant.

CAMPBELL, J:

This is a bill filed to set aside a conveyance made by one Jasper Underhill to defendant, of lands in Branch county, which complainant alleges belong in equity to him and should be conveyed to him under an agreement made by said Underhill.

Complainant was the step-son of Underhill and came to Michigan with his mother and step-father during his minority, living on a farm of eighty acres, of which the forty acres in question formed a part.

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The transaction relied upon is claimed to have been as follows: In 1841, a few months after complainant came of age, he was making preparations to go away and set up work for himself. Underhill was opposed to this, and wanted complainant to stay with him and work the farm and take care of the family. After some discussion, complainant accepted his offer that if complainant would do so he would deed him half of his farm, being the forty acres in question, reserving the remainder for his son; that complainant has ever since retained control and management of the farm, improved it, paid taxes on it, and built a house upon it worth several hundred dollars; that Underhill and wife lived with complainant before and after his marriage, until Mrs. Underhill died in 1870, except during some not very long intervals; that after her death, and at the close of 1871, Underhill went to live with defendant, who was his son-in-law, and stayed there till his death in the spring of 1873; that in December, 1872, defendant procured, by importunity and undue influence, from Underhill, a conveyance of the property, and in January, 1873, began an ejectment suit, on which he recovered judgment against complainant, who has obtained a new trial under the statute.

Defendant denies the contract, insists on its invalidity if made, and claims to be a purchaser in good faith.

If the testimony in this case can be acted upon, we think the complainant has made out the contract in substance as alleged. If we believe his story, and it has impressed us as reliable, and corroborated by circumstances, the agreement was distinct and certain as to the land and the consideration, and the case shows, not a vague expectation of benefit, but a distinct and positive promise. Neither is it a promise to make a gift. It was an arrangement which contemplated beyond question such family conduct as would benefit both parties; but it involved an expectation of more benefit to Underhill and wife than to complainant, and it required him to give up plans for independence, which no young man would be likely to resign without strong motives and family attachment. And the fact that he remained in this mode

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of life, after as well as before his marriage, for more than thirty years, is one of the strongest corroborating proofs that could be given that his story is true. It would be an unaccountable thing otherwise that a man of at least some degree of sense and business activity should spend such an existence. The counter testimony has not convinced us either that complainant's story is doubtful, or that defendant is an honest purchaser. And had he purchased in ignorance, which we think he did not, the complainant's position called on him to inquire, and if he had done so fairly and promptly he could not have been misled.

It is claimed, however, that the testimony of complainant involves statements of matters which were in the knowledge of Underhill equally with himself, and are precluded by the statutory rule applicable in cases of legal controversies with the representatives of deceased persons.

There is some other evidence, but none so full or satisfactory, and this question becomes material. But we do not think we are authorized to interpolate into the statute any such prohibition in controversies with third persons acting in their own right as purchasers during the life of the deceased, and not taking by any *post mortem* estate. Defendant not only purchased, but began his ejectment during Underhill's life.

Upon the theory of the bill, which charges that the property was obtained by undue influence over an old and feeble man, complainant would come more nearly into the position of Underhill's representative than defendant, who is charged to have wronged him out of what was a trust estate. But we do not deem it important to consider to what extent these suspicions should prevail.

It is also claimed that complainant has barred himself from the relief sought, because when Underhill conveyed to defendant, complainant brought suit in attachment and levied on the land to collect such of his advances and expenditures as were not barred by the statute of limitations. Without considering what weight would have belonged to such a pro-

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ceeding had Underhill lived and been a party to this action and had the attachment suit been kept on foot, it is enough to say that defendant was a stranger to that proceeding, and took the land in question as a trustee subject to complainant's beneficial interest, and that he has not set up the attachment as a defense, or made any averments bringing him into privity with it. The reference to attachment proceedings in the answer is casual and not direct, and shows no purpose to rely on them as a bar. They are not described or identified, and the idea of setting them up now is outside of the issues, and probably an after-thought.

We think the decree below was correct, and it must be affirmed, with costs.

The other Justices concurred.

Curtis R. Botsford v. The Michigan Central Railroad Company.

This case is held to be ruled by *Fort Wayne, Jackson & Saginaw R. R. Co. v. Gildersleeve, supra, p. 133.*

Submitted on briefs January 7. Decided January 11.

Error to Van Buren Circuit.

This was an action to recover damages for injuries sustained by plaintiff in error while in the employ of defendant in error as brakeman and engaged in coupling freight cars. The ground upon which a recovery was sought was, negligence on the part of the company in not furnishing for plaintiff's use safe and properly constructed freight cars. The defect ascribed to the cars is not unsoundness or want of repairs, but the complaint is that one was lower than the others, and that for that reason the chances of injury in

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coupling were increased. The court below directed a verdict for the defendant, and the plaintiff brought error.

Foster & Beebe, for plaintiff in error.

Edwards & Sherwood and *G. V. N. Lothrop*, for defendant in error.

THE COURT held that this case is ruled by *Fort Wayne, Jackson & Saginaw R. R. Co. v. Gildersleeve, supra, p. 133.*

Judgment affirmed.

August Bohn v. James F. Brown.

Corporations: Stockholders: Individual liability: Damages for negligence. The claim of a passenger who has been injured by the negligence of the agents of a corporation carrier, is not one which, after judgment against the company and execution returned unsatisfied, affords a ground of action against the stockholders under our statute.—*Comp. L. 1871, §§ 2478-80.*

Construction of statute. The statute in question is to be construed in accordance with the natural and ordinary sense of the language used.

Corporations: Stockholders: Individual liability: Statute construed. It was not the design of this statute to make every judgment against the company, for whatever cause, a ground of action against the stockholder, but the cause of action against the stockholder is made identical with that against the company, and the proceedings against the company, in case it is not dissolved, are mere matters of inducement.

Individual liability of stockholder: Judgment against corporation. Where the case is a proper one for sustaining the liability of the stockholder, it seems that the judgment against the corporation, if obtained without fraud or collusion, is conclusive and binding upon the stockholder, as to the fact and the extent of the liability of the company, but the questions whether the cause of action adjudicated was of a nature to involve the stockholder under the statute, and whether the conditions as to ownership of stock, and the fact of such ownership at the times specified, existed, should be considered open.

Corporations: Individual liability of stockholder: Statute construed: Debts contracted: Torts. The nature of the demands against the corporation which will support the action against the stockholders, except where dividends are improperly declared or paid, is limited by the statute to

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claims for labor performed and for debts contracted, and this excludes all others; and no claim founded on pure tort is within the statute.

Corporations: Liabilities of stockholders: Debts contracted: Damages for negligence. The liability of a carrier for an injury to one of its passengers caused by the negligence of its agent, though the grievance be one for which the passenger was at liberty to sue either in *assumpsit* for the breach of the contract to carry safely, or specially on the case upon the negligence of the carrier, is one the real gist of which is the wrongful act of the carrier, and is in its essential ingredients one based upon the tort; and it is not, therefore, within the meaning of the statute in question, a "debt contracted."

Heard October 15. Decided January 18.

Error to Saginaw Circuit.

F. L. Eaton and *Albert Trask*, for plaintiff in error, cited: *Grund v. Tucker, 5 Kan., 70; Downworth v. Coolbaugh, 5 Iowa, 300; Corse v. Sanford, 14 Iowa, 235; Gaskell v. Dudley, 6 Met., 548; Johnson v. Somerville D. & B. Co., 15 Gray, 216; Thayer v. N. E. Lith. Co., 108 Mass., 523; Milliken v. Whitehouse, 49 Me., 527; Vanhook v. Whitlock, 2 Ed. Ch., 304; Alvord v. Lent., 23 Mich., 369; Attorney General v. Bank, Har. Ch., 315; Mill Dam Foundry v. Hovey, 21 Pick., 455; Gray v. Bennett, 3 Met., 522; Haynes v. Brown, 36 N. H. 566; Carver v. Braintree M. Co., 2 Story, 432.*

John J. Wheeler, for defendant in error, cited: *Witherbee v. Allen, 3 Keyes, 565; Miller v. White, 50 N. Y., 137; McMahon v. Macy, 51 N. Y., 155; Belmont v. Coleman, 21 N. Y., 96; Coffin v. Reynolds, 37 N. Y., 640; Aiken v. Wasson, 24 N. Y., 482; 14 Wend., 58; Cable v. McCune, 26 Mo., 371; Cable v. McGaty, 34 Mo., 573; Lockhart v. Van Alstyne, 31 Mich., 76.*

GRAVES, J:

The plaintiff, a child, was in August, 1869, taken as a passenger on the East Saginaw city railway, and whilst being carried as such passenger was severely hurt through the negligence of the company's conductor. For such injury an

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action was brought against the company, and on the 5th of March, 1873, the plaintiff obtained judgment for damages five thousand five hundred dollars and costs taxed at ninety-five dollars and sixty-six cents.

The corporation then brought the case here on writ of error, and we affirmed the judgment in July of the same year.—*27 Mich., 503.* An execution was issued and returned *nulla bona*, and the plaintiff, having thus failed to collect of the corporation, instituted this action against Brown to enforce collection of him as owner and holder of a considerable amount of unpaid capital stock, and the jury having found against the plaintiff by express direction of the court, he now claims a revision of the proceedings on writ of error and bill of exceptions. The suit, of course, does not assume to proceed for a common-law cause of action against Brown, but is prosecuted against him on the strength of certain provisions of the act under which the company were incorporated, and being the amended act of February 13th, 1855, entitled "an act to provide for the construction of train railways."—*Ch. 76, C. L.*

The main question is, whether the claim of a passenger under such circumstances, after judgment against the carrier and execution returned unsatisfied, affords a ground of action against the stockholder. All admit that the point depends upon the construction due the provisions before mentioned, and these provisions are found in the eighteenth and twentieth sections of the act.

The eighteenth section reads as follows: "The stockholders of every company incorporated under this act shall be jointly and severally liable in their individual capacity for all labor performed for such company; and shall also be liable for the debts of such company, for an amount equal to the amount of any unpaid stock in such company, held by them at the time such debt was contracted and suit commenced thereon, to be recovered of any stockholder who is such when the debt is contracted, or any subsequent stockholder."

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The nineteenth section makes directors and stockholders jointly and severally liable for existing company debts, and debts afterwards contracted whilst such directors continue in office and the others remain stockholders, in case the directors declare or pay a dividend when the company is insolvent, or when the payment would either render it insolvent or diminish the amount of capital stock. Then comes the twentieth section, which reads as follows:

"But no suit shall be brought against any individual stockholder for any debt of such company as provided in the last two preceding sections, until judgment on the demand shall have been obtained against the company, and execution thereon returned unsatisfied in whole or in part, or until the company shall have been dissolved; and any stockholder who may have paid any debt of such company, either voluntarily or by compulsion, shall have a right to sue and recover of such company the full amount thereof, with interest, costs and expenses; and any such stockholder, who may have paid as aforesaid, shall have a right to bring an action against, and recover of the rest of the stockholders, or any one or more of them, the due proportion thereof which such stockholder or stockholders ought to pay; and if such action for contribution shall be brought against more than one stockholder, the judgment and the execution thereon shall specify the amount to be recovered and collected from each defendant."

As understood, the position of plaintiff's counsel is, that it makes no difference in respect to the right to sue the stockholder, whether the cause of action against the company is a pure tort, committed by the company through its servants, or one sounding exclusively in contract; and that the judgment recovered against the company is conclusive, or at least *prima facie* sufficient, to ground an action against the stockholders under the provisions in question.

On the other hand, defendant's counsel insists, that the cause of action against stockholders is identical with that against the corporation, and that to bring stockholders under

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individual liability the cause of action must be a debt contracted by the corporation, and not a liability of the company arising from the tortious conduct of company agents or servants, and that a judgment recovered against the corporation for such tortious conduct is not a debt contracted to bind stockholders as individual debtors. In the few cases found in which courts have considered similar provisions there would seem to have been much diversity of opinion. And looking at the question which arises here, and the shape it assumes under the influence of the facts which have a bearing, it appears to me that the authorities cited by counsel do not offer forcible aids. Hence in forming an opinion on the precise case to be decided, it is the better way to read the foregoing provisions as we think they were intended to be read, and then apply them to the actual facts.

In pursuing this course we must suppose that the mind of the legislature being specially drawn to the subject of departing from the regulations of the common law in regard to the liability of corporators, and conceiving a purpose to make certain members responsible for company liabilities, the extent of the departure and the class of liabilities, if less than all, and the limitations and conditions, if any, would naturally be indicated with some distinctness, and we should expect to find in the terms and arrangement of the statute, without straining or refinement, the real sense of the legislature. Whether in our judgment the legislature went too far, or did not go far enough, is not for us to consider. The scope of our duty is to ascertain just how far the law makers went, and then to pause precisely where they did. In studying the provisions here with this object, we are forced to think that the expressions used to denote the conditions of the stockholders' liability are to be taken in their natural and ordinary sense.

Passing these general remarks, we are to consider, in the first place, whether it was meant that a judgment, for whatever cause, against the company should be deemed in itself a definite ground of action against the stockholder. The

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plain language of the law appears to negative any such purpose. The cause of action against the stockholder is made identical with that against the company. The original *debt* or *demand* against the company is what the stockholder is made liable for, and not something of a different nature. In regard to this there is no ambiguity. The idea is never departed from. The right to sue the stockholder is just as broad, or more precisely, the causes of action on which he may be held are just the same, in case the corporation is dissolved, as in case it is not, and in all instances where the corporation is dissolved, care is taken to dispense expressly with the condition requiring judgment to be first obtained against the company. Accordingly in such cases no judgment could exist to sue upon, and the original cause of action would have to be resorted to. The statute throughout assumes the existence of a cause of action against the stockholders prior to judgment against the company, and in case the corporation is not dissolved, requires the proceedings against the company as preliminary to a suit against the stockholder, not to bring into existence a cause of action against him, but, among other things, to collect of the corporation itself, if practicable, before going against the stockholder. The fundamental ground of action against the stockholder is, then, the original cause of action against the company, and the proceedings against the corporation, when it is not dissolved, are matters of inducement. Had it been intended to make every unsatisfied judgment against the corporation, for whatever cause, a ground of action in itself against the stockholder individually, the terms and arrangement, we must suppose, would have been different. Moreover, as will appear, the intrinsic nature of the liability of the corporation before judgment against it, is made a criterion for the stockholders' secondary liability, and any such arrangement would be absurd if the recovery itself against the company had been fixed upon as constituting the source of this liability of the stockholders. It is perhaps unnecessary in this case to decide what force the judgment against the

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corporation should have on the trial against the stockholder; but there is room for contending that the statute recognizes as a principle, that where the judgment is obtained without fraud or collusion between the company and the claimant, the existing stockholders are represented by the company, and bound by the judgment, in regard to the liability of the company and the amount, and that the controversy concerning the original liability should not be open to litigation by stockholders, after a determination against their representative, the company. Some analogy is perceived between such a case and that where a judgment creditor who has exhausted his remedy at law proceeds by creditor's bill. True it is not close. In view of the scheme as it stands enacted, it would seem requisite that the question as to whether the cause of action adjudicated was of a nature to involve the stockholders under the statute, and whether the conditions as to ownership of stock, and the fact of such ownership at the times specified, existed, should be considered open. And of course if the proceedings against the corporation should appear to be tainted by fraud or collusion between the claimant and the corporation, the judgment would not be good as inducement, or as an adjudication to fix the liability of the stockholder through it, or to fix the amount, and the suit against the stockholder would fail inevitably.

We may secondly consider whether the plaintiff's claim against the corporation in its unadjudicated state was intrinsically a *debt contracted* by the corporation. Because if it was, he had a contingent right of action, by force of the statute, against Brown as holder and owner of unpaid stock; and if it was not, he had no such right.

In observing upon this point we cannot help seeing that the legislature evidently designed to limit the liability of stockholders to a portion only of the kinds of liabilities the company would be subject to incur; that necessarily contemplating there would be claims arising out of contract, and also out of wrongful and tortious acts, and deciding to

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provide that for some of these liabilities the stockholders should be individually responsible, but not for all, the legislature proceeded to word the provisions as we find them. Instead of enacting in general terms that stockholders should be individually responsible for all valid claims against the corporation, to one extent or another, the legislature cautiously and guardedly specified charges for labor, and claims for *debts contracted.* Certainly it must be admitted that in thus casting personal responsibility upon stockholders on account of particular causes of action, it was designed they should remain not responsible for others; and in order to find what kinds were meant to be left out, we must follow the description of the causes of action brought in, and to be met by stockholders. Except where dividends are improperly declared or paid, the right to go against stockholders is authorized only in cases of demands for labor performed, and in cases of debts contracted. All these are purely matters of contract, and no claim founded on *pure tort* is embraced; and if not embraced, it is excluded. The conclusion is then warranted that the legislature, foreseeing that corporations would be subject to incur liabilities upon contract, and also for *pure torts,* were minded to not extend the remedy against stockholders, in their individual character, to the latter.

The law then draws a line and fixes a limit, and that line excludes claims springing directly from a pure tort.

For example, suppose a person entitled to do so had attempted to cross the railway track, and, although himself exercising due care, had been run against and injured by the cars by means of the admitted negligence of the company. Had such a case happened, the injured person would have had no eventual remedy against stockholders in their individual character, on the strength of the provisions we are considering. His cause of action against the corporation would not have consisted of, or rested on, a debt contracted. It would have been for a plain tort and without any thing of contract inducing it, and without any mixture

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or shading of contract in or connected with it. It would have been as clear of any ingredient, badge or color of contract as a naked assault would be. A legal liability would have existed, but it would be a gross abuse of terms to call it a debt contracted.—*Fox v. Hills, 1 Conn., 295.*

But the original cause of action of the plaintiff against the corporation in the present case was a different one in its surroundings, in its antecedent and concomitant facts, and it is this difference which causes all the difficulty there is.

A contract relation did actually exist between the plaintiff and the corporation, and the claim of the plaintiff, and the liability of the corporation, were caused by conduct of servants of the corporation in the course of performance of the company's undertaking. This conduct was at the same time a breach of the contract and a tort.

The company were carriers of passengers, and the plaintiff was being carried by them upon an undertaking to carry him safely. They did not carry him safely, but, on the contrary, caused him a severe personal injury. For that injury he was at liberty to sue, either in assumpsit for the breach of contract, or specially on the case upon the negligence of the company. And it may be said with some reason that the distinction between the *form* of action and the *cause* of action should be borne in mind, and that the case ought not to be varied because the law allowed a remedy in form *ex delicto* as well as *ex contractu*. On the first view of the subject I was not satisfied that the plaintiff's claim might not be considered, on the theory here indicated, a debt contracted, within the sense of the statute, but a closer inspection of the subject has removed that impression.

It is certainly correct to say, that the circumstance that the plaintiff's grievance was of such character that the law gave him an option as to the form of remedy, and allowed him to proceed in assumpsit or special case, and that the same facts were adducible and proper to support either form, cannot rule the question, or lead to a solution of it. And it is equally true that the circumstance that the wrong was

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done in the course of carrying out, and in the way of carrying out, a contract which subsisted between the plaintiff and the corporation, and that such wrong in itself constituted a breach of the contract, will not suffice to settle the point. The intrinsic nature of the specific matter standing as the cause of action, or the gist of it, would remain the same, whatever the form of remedy, and the specific wrong, whether consisting of negligence or blows, would still be tortious in its own nature, though amounting to a breach of contract at the same time. Viewed from any side it would be a tort. True, the plaintiff at his election would be at liberty to use it in evidence to prove a breach of contract, but not because in its own nature it would prove nothing more. A clerk under contract with his employer to render honest service may break his agreement and make himself liable therefor by an act of embezzlement, but the criminal act will not be shorn of any of its criminal features on account of the special agreement to render honest service.

Keeping in mind the abstract quality of the fact on which the right of the plaintiff to call on the company for redress depended, and passing the artificial methods of redress, and also the circumstance that the fact of injury was done in the course of carrying out the company's undertaking, we are enabled to perceive clearly that it was a downright tort which called for atonement, for satisfaction, and was not a *contracted debt*, to be collected if practicable from the company as promissor, and if not practicable, then from stockholders.

There was a liability of the corporation for a real wrong, a tort *in a setting of contract*, and the plaintiff had the right to enforce such liability in any form of procedure which by law was open to him. He was in a situation to obtain, not a debt the company had engaged for, but such damages for the tortious injury done to him as a jury might find it just and reasonable to award. The enforcement of payment of a contracted debt through a suit at common law is quite similar in principle, when fictions and artificial dis-

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tinctions are put aside, to enforcement of specific performance in equity, but the enforcement of a liability caused by a real tort is wholly dissimilar. In the former case the obligation to be coërced is something which is the primary, direct and immediate end of express or implied agreement, whilst in the latter the liability is for damages which the law considers, not as the primary and immediate end of an agreement, but as something secondary and consequential,—a satisfaction for a *wrong done*. Whatever the form of remedy, the actionable grievance in the one case is not one of those transgressions of right which the law permits the injured party to sue for in tort, whilst in the other, the grievance is one where the constituent facts fix its intrinsic character, and show it to be such a transgression of right as amounts to a tort, and is suable as such. The grievance of the plaintiff was of this latter kind, and its nature would remain the same however the pleader might see fit to use the facts in choosing a form of remedy. Undoubtedly the nature of the remedy chosen would control in regard to many remedial incidents, but this matter is quite aside from the present consideration.

No doubt the case is a hard one, but we cannot extend the stockholders' liability further than the legislature have done. Whether the actual circumstances will warrant any mode of proceeding other than an execution, suited to bring about a satisfaction of the judgment, we are not called on to consider.

The judgment is affirmed, with costs.

The other Justices concurred.

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Augustus D. Griswold v. Hernando A. Fuller and others.

Equity jurisprudence: Bill to quiet title: Judicial sale: Title of complainant. A bill to remove a cloud from the title to lands, which deduces complainant's title through a judicial sale, cannot be sustained where the proceedings which were the basis of such sale, and upon which the validity of complainant's title depends, are shown to be void for jurisdictional defects.

Equity jurisprudence: Sale of lands to satisfy debts: Execution: Levy. Courts of equity have no authority, upon a bill by a judgment creditor alleging that his debtor became vested with the legal title to lands, and that by certain subsequent void proceedings an ostensible but invalid title, which was a mere cover and not a valid interest, had been conferred on third persons named, who in law held only as trustees for such debtor, in the absence of any averment or showing of an execution levy upon the lands in his favor, to decree the sale of such lands for the satisfaction of the judgment.

Transfer of legal title: Equitable rights: Equity jurisprudence. While mere equitable rights and titles may in suitable cases be made available by a direct proceeding in equity to satisfy judgments, through a receiver or otherwise, the transfer of the legal title to land, through the immediate power of the court, where no lien has been previously obtained, in order to satisfy judgment creditors, is not an attribute of the traditionary jurisdiction of equity, nor is any such authority conferred by our statutes.

Decree: Judicial sales: Notice: Description: Sales by parcels. Under a decree authorizing a sale of lands by a commissioner upon public notice "according to the course and practice" of the court, "in such convenient and reasonable parcels" as in his opinion should be most conducive to the interest of all the parties, a sale upon a notice which fails to give any description of the lands, and by putting up and striking off numerous distinct bodies upon one offer and bid, is unwarranted and illegal.

Heard January 6. Decided January 18.

Appeal in Chancery from Muskegon Circuit.

Eggleston & Kleinhans and *Jacob Ferris*, for complainant.

E. Gould and *C. I. Walker*, for defendants.

GRAVES, J:

Complainant claims to own and be in possession of numerous large tracts of land in different counties in this state, and which land he alleges defendants are seeking to subject

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for debts of the Detroit & Milwaukee Railway Co. as property of the latter, and which proceedings he avers becloud his title and impair his equitable rights.

He deduces his title from a decree of the circuit court for the county of Oakland in chancery, made on the 8th of December, 1863, and entered on the 18th of January, 1864, in a suit brought by Morgan L. Drake against the Detroit & Milwaukee Railway Co. and others, and upon a sale made thereunder by a circuit court commissioner for the county of Oakland, on the 25th of April, 1864, and the order to confirm the same, dated May 7th thereafter.

Whatever, therefore, may be said in regard to other aspects of the case, he cannot have relief unless title to the land was obtained through these proceedings, and if the proceedings were actually defective and invalid on jurisdictional grounds, then no title was obtained.

The defendants urge that there were many such jurisdictional defects, and therefore that the present bill was rightly dismissed by the court below.

The term "want of jurisdiction" is used in equity tribunals in different senses.

Sometimes it is conventionally applied, and means no more than this: that the litigation is not launched in such manner as to make it regular for the court to take cognizance of it, or that the proceedings, although well enough begun, are not so shaped or proceeded in as to make it proper to allow relief, or some particular relief in question; and yet it is well understood that if cognizance of the controversy is taken in the one case, or if the court allows some relief, or the particular relief, in the other, the action had must bind unless set aside in some direct proceeding.

There is no need to mention cases to illustrate this, because they must be familiar to all. But apart from cases within this principle we recognize those cases where the defects or miscarriages are so vital or far reaching that the proceeding is *positively bad*, and does not require to be formally set aside in order to prevent its having operation as

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something of lawful force. Every court is in some way limited in its powers. There must be certain conditions on which the right to act depends; and in most cases, certainly, the absence of these necessary conditions must deprive the act, if done, of all legal force. When the act is not merely an error or irregularity in the exercise of jurisdiction, but consists in taking cognizance of a case or proceeding without any power to do so, or in doing something which, on account of the character of the court, the nature of the litigation, the subject matter and the aptitude of the complaint, pleadings or issues, is absolutely beyond its legal sphere of action or authority, or in positive derogation of its competency, or in contravention of the power marked out by law for its course of action, then, however well intended in point of fact, the thing done amounts to usurpation, and cannot possess any binding force.

Now, when we read the record before us, we notice, in the first place, that the decree in Drake's case was *pro confesso*, and that there is no averment in the present bill, or any proof in the record, that any defendant in Drake's case was subpœnaed or notified in any form, neither does the present bill state that any defendant appeared in that case. But we do not rest on this. We proceed to notice briefly the nature of Drake's complaint *touching these lands* and his position in court, in order to ascertain the foundation and scope of the court's authority to decree *pro confesso*.

He claimed to be owner of a judgment for a large sum against the Detroit & Milwaukee Railway Co., and he filed his bill in the circuit court for the county of Oakland in chancery, to obtain collection of it. He alleged the recovery of the judgment by other parties, its transfer to him, and that executions had been issued in Oakland county and returned *nulla bona*, except as to a small portion.

He made no charge, and there was no pretense, that any of the lands in question had been levied on. He however alleged positively that these lands were "vested fully and completely" in the company, but that by certain subsequent

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void proceedings of the board of control and others, an ostensible but invalid title had been conferred on certain named persons, and that such ostensible title was a mere "cover," and not a valid interest, and that in fact these persons were only holding for the use of the company.

It is too plain to admit of question, that Drake's entire case, as made by his bill, concerning these lands, was framed and based exclusively on the theory and assumption that the company had previously acquired the legal title and was still the true owner, and that what had been done by and through the board of control with others had served to create an ostensible and colorable title merely, in the persons named, as trustees, and which was simply an obstacle in his way to the obtainment of a complete title by sale on execution at law on the judgment against the company.

With the case thus based and shaped in relation to these lands, the court in decreeing *pro confesso*, or in other words, in proceeding to decree when it could only do so within the precise limits of the case made by the bill, and upon the theory of an admission by the defendants of a right to just such relief, and no other, as the actual case stated by complainant authorized, did not keep within the bounds prescribed by the case, or even within the limits which would have existed if there had been a levy, but went on and ordered that the premises in question, or so much thereof as should be sufficient to raise the amount due, be sold at public auction under the direction of the circuit court commissioner for Oakland county, at the court house at Pontiac, upon "at least six weeks' public notice of the time and place of such sale, according *to the course and practice of this court*;" and further, among other things, that the lands should be so sold "in such convenient and reasonable parcels as *in the opinion of said commissioner* should be most conducive to the interest of all the parties."

The advertisement of the commissioner gave no specific description of the lands whatever. It mentioned the lands as being all sections and parts of sections denoted by odd

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numbers within fifteen miles of the railroad between Owosso and Grand Haven, which the United States owned on the 3d of June, 1856, and then suggested that a particular description could be obtained from the commissioner, or by referring to the register of the court.

The sales under which complainant claims title were made on the strength of these proceedings, and numerous tracts were offered in one body, and struck off together upon the bid of a round sum. Now it seems clear to us that no change of title was produced by these proceedings. There are several reasons for holding that the course taken was without legal force to shift or impair the ownership, but it does not seem needful to advert to more than one or two.

The case made by the bill, instead of placing the court in a situation where it could, even through the commission of an error within the scope of its jurisdiction, directly subject the lands to sale through its own process in order to satisfy the judgment, excluded on its face all right in the court to order any sale, or even to decree upon the question of title to the lands. If the lands vested in the company, as this bill alleged, and the title was subsequently entangled, but still virtually belonged to the company, as the bill also alleged, a lien by levy was practicable, and was indispensable for the purpose of founding a jurisdiction in a court of equity to assist in compelling payment of the judgment. Upon the theory of the bill in other respects, if there had been a levy, it would have been within the general competency of the court to have removed the obstructions in the way of the execution at law, but then it could regularly have gone no further than to afford such auxiliary aid in so far as these lands were concerned.

As it was, there was no more authority to order the sale of these lands by the commissioner to satisfy the judgment, than there was to dissolve the corporation. There was no basis in the bill for it, and the authority was as much wanting as it would have been if no case at all had been pending.

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The transfer of legal title to land, through the immediate power of the court, where no lien has been previously obtained, in order to satisfy judgment creditors, is not an attribute of the traditionary jurisdiction of equity, and there is no statute in this state to authorize it. Mere equitable rights and titles may be directly dealt with, and in proper cases, and when necessary, made available to satisfy judgments, through a receiver or otherwise.

The assuming, in the case of Drake, to decree a sale of the lands by commissioner, was, we think, a plain excess of power, and one which involved a loss of jurisdiction to the extent of such excess. The act was void upon its face. No doubt as the decree was *pro confesso*, the learned judge, under whose authority it seems to have been allowed, inadvertently permitted the complainant to draw up and take at his peril such decree as he deemed the case warranted and himself entitled to. Indeed, we cannot avoid thinking that the decree was, in fact, such an one as the complainant saw fit to draw on the footing of the default, and that the court never gave it any strict examination at all.

There are difficulties likewise in the proceedings subsequent to the decree. The commissioner in advertising and in selling disregarded the directions in the decree in substantial particulars. He did so in omitting to give any description of the lands in his advertisement, and also, in spirit, in selling numerous distinct bodies upon one offer and bid.

It does not, however, appear necessary to dwell on this objection, or to notice others which are suggested by the record.

The decree of dismissal should be affirmed, with costs.

COOLEY, CH. J., and MARSTON, J., concurred.

CAMPBELL, J., did not sit in this case.

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Minne Hourtienne v. Christian Schnoor.

Evidence: Conflict of testimony: Presumptions: Probabilities. In case of a bill by a wife to avoid a mortgage made on the homestead of her husband during the family occupation of it, on the ground that she never knowingly signed or acknowledged it, all presumptions, in case of conflict of testimony, must be treated with reasonable respect to the improbability of misconduct in a reputable officer, or of forgery which he ought to have discovered if it existed; and the burden of proof is on complainant to make out a plain case.

Heard January 7. Decided January 18.

Appeal in Chancery from Macomb Circuit.

Edgar Weeks, Sylvester Larned and *H. B. Carpenter,* for complainant.

Hubbard & Crocker, for defendant.

CAMPBELL, J:

Complainant filed her bill to avoid a mortgage made on the homestead of her husband during their family occupation of it, alleging that she never knowingly signed or acknowledged it.

There are some suspicious circumstances about the case, but there is no doubt of the mortgagee's good faith, nor of the fact that the money was borrowed and used to build a house on the premises. The justice who took the acknowledgment swears quite distinctly upon the facts, and there is corroborating evidence.

All presumptions in cases of this kind must be treated with reasonable respect to the improbability of misconduct in a reputable officer, or of forgery which he ought to have discovered if it existed; and the burden of proof was on complainant to make out a plain case.

We do not think her case is clear enough to warrant us in disturbing the decree against her below, which is affirmed, with costs.

The other Justices concurred.

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George Kling v. Valentine Fries and another.

Trial by court: Special finding: Weight of evidence: Facts found: Judgment. Where a cause is tried by the court without a jury and a special finding filed, the weight of the evidence will not be considered on review, but it being conceded there was evidence tending to prove the facts found, the only question left open in that regard is, whether the facts as found support the judgment.

Contracts: Place: Agency: Verbal order: Approval: Goods sold and delivered. Where an agent takes in Michigan a verbal order for goods and transmits it to his principals in Ohio for approval, and the latter there approve it and consign the goods to a common carrier in Ohio, and the vendee accepts the goods in Michigan, paying the freight, the contract is an Ohio contract, and not a Michigan one; and though the goods be intoxicating liquors, the transaction is not within the Michigan statute.

Contracts for sale of goods: Title: Delivery: Common-law rule. At the common law a contract for the sale of goods, where nothing remains to be done by the seller before making delivery, transfers the right of property, though the price has not been paid, nor the thing sold delivered to the purchaser.

Presumptions: Illegality: Contracts: Statutes of another state. Illegality will not be presumed; nor will it be presumed, as against the validity of a contract, and in the absence of proof, that the statutes of another state have provisions similar to those of Michigan, and in derogation of the common law.

Sales of goods: Liquors: Statutes of other states: Presumption: Intention. It will not be presumed, in the absence of evidence or finding, that parties making a sale in another state, where it was presumably valid, of liquors to be transported to Michigan, intended thereby to assist the purchaser in violating the Michigan statute.

Heard January 7 and 11. Decided January 18.

Error to Ionia Circuit.

Chute & Smith, for plaintiff in error, cited: *2 Pars. on Con., 587; Story on C. of L., §§ 38, 257 a, 259, 317, 272 a, 278 a; Thompson v. Ketchum, 8 Johns., 190; Comp. L. 1871, §§ 2148, 4699; Paton v. Coit, 5 Mich., 510; Hyde v. Goodnow, 3 Cow., 266; Bancher v. Mansel, 47 Me., 62; Raw v. People, A. L. J., Dec. 11, 1875, p. 377; Hunt v. Knickerbocker, 5 Johns., 326; Davis v. Bronson, 6 Iowa, 425; Wilson v. Stratton, 47 Me., 120; Territt v. Bartlett, 21 Vt., 184; Spaulding v. Preston, 21 Vt., 9; Tracy v. Talmadge, 14 N. Y., 162; Griffith v. Wells, 3 Denio, 226; Bank v. Niles, 1 Doug., 400; Myers v. Carr, 12 Mich., 72.*

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Mitchel & Pratt, for defendants in error, cited: *Dolan v. Green, 110 Mass., 322; Abberger v. Marvin, 102 Mass., 70; Ely v. Webster, Ibid., 304; Adams v. Coulliard, Ibid., 167; Finch v. Mansfield, 97 Mass., 87; 1 Pars. on Con., 533 a; Story on Sales, § 306(4); 2 Kent's Com., 499; Ellis v. Maxson, 19 Mich., 186; Kermott v. Ayer, 11 Mich., 181; Whitford v. Panama R. R., 23 N. Y., 465; People v. Lambert, 5 Mich., 349; Holdridge v. F. & M. Bank, 16 Mich., 66; Kentucky v. Bassford, 6 Hill, 526; Andrews v. Herriot, 4 Cow., 508, note; Holman v. Johnson, Cowp., 341; Kreiss v. Seligman, 8 Barb., 439; McIntyre v. Parks, 3 Met., 207; Haven v. Foster, 9 Pick., 111; Bank v. Dodge, 8 Barb., 233; Bank v. Curren, 36 Iowa, 555; Whitlock v. Workman, 15 Iowa, 351; School Dist. v. Snell, 24 Mich., 350; Saxton v. Macomber, 28 Mich., 316; Scudder v. Worster, 11 Cush., 573.*

MARSTON, J:

Fries and Vilas brought an action of assumpsit against Kling to recover the amount due upon two promissory notes made by the latter and payable to the order of V. Fries & Co.

The defendant pleaded the general issue, with notice that the notes sued upon were given for intoxicating liquor purchased from plaintiffs, and that they were by reason thereof null and void.

The cause was tried by the court, who found the facts to be, that in 1872 and 1873 the plaintiffs were wholesale dealers in liquors at Cleveland, in the state of Ohio; that the defendant was engaged in the same business at Ionia in this state; that in October, 1872, the plaintiffs' agent, at defendant's place of business, took defendant's verbal order for a quantity of liquors, and transmitted said order to the plaintiffs in Ohio for their approval; that the plaintiffs approved of defendant's order and consigned the goods to a common carrier in the city of Cleveland; that defendant took the

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goods from the carrier in Michigan, and paid the freight. Other facts were found as to the making and delivery of the notes, and the amount due thereon, but it is unnecessary to set forth the same in detail.

From the facts found, the court held the contract and sale was not made in Michigan, nor in violation of the laws of this state; that the plaintiffs were therefore entitled to recover; and judgment was rendered accordingly.

Counsel for plaintiff in error discussed several questions which we think are not raised by this record. It is not denied but that there was evidence given on the trial tending to prove the facts found by the court, and the only question for us to determine is, whether the facts as found support the judgment.

It is insisted that because plaintiffs' agent, as found by the court, solicited and obtained the order in this state, and the defendant afterwards received the liquors from the carrier in this state, and paid the freight thereon, the contract was therefore a Michigan contract, notwithstanding the fact that the order was by the agent sent to Ohio for approval, approved there, and the goods then shipped to defendant.

It is certainly quite clear that no agreement was entered into between the parties at the time the order was given. The court does not find that an agreement was then made, or that the agent did any thing beyond soliciting the order and sending it forward for approval by his principals. Had the order been for some other kind of goods, taken and sent forward for approval as this was, no one will contend that Kling could have sustained an action against Fries & Co. for a failure on their part to approve the order and ship the goods, and this irrespective of any question that might be raised under the statute of frauds. Until the order was approved or accepted by the plaintiffs, there was no agreement made. The order was not binding until accepted; but when accepted the contract then became complete and binding. The order might have been in writing and sent to Fries & Co. by mail; or Kling might have sent a verbal

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order by some person going to Cleveland; or he might have gone there and given the order himself; in either event, the acceptance of the order would have been necessary to have made a valid contract, which must be founded on mutual assent. The minds of the parties for the first time met on the approval of the order in Ohio. The contract was then entered into, made complete and binding, and must therefore be considered as having been made at that place. See this question discussed, and the authorities collected in *1 Parsons on Contracts, pp. 480, 485.*

The offer and acceptance being verbal, and the goods purchased exceeding in value the sum of fifty dollars, was the contract within the statute of frauds, so that an acceptance of the liquors by Kling was necessary to its validity? Illegality will not be presumed. In order to show that the contract was illegal, it was incumbent on the defendant below to prove that it came within the statute. There was no evidence introduced, nor did the court find what the law of the state of Ohio required as essential to the validity of such a contract, or that under the laws of that state such a contract was void. At common law this contract would have been valid: delivery of the liquors would not have been essential to its validity. It is said to be "a general rule of the common law, that a mere contract for the sale of goods, where nothing remains to be done by the seller before making delivery, transfers the right of property, although the price has not been paid, nor the thing sold delivered to the purchaser."—*Whitcomb v. Whitney, 19 Mich., 490.* We cannot presume that the statute of Ohio is similar to ours. If, under the statute of that state, something else besides the acceptance of the order was essential to make the contract valid and binding, the statute should have been introduced in this case. In the absence of such proof, we must presume that the contract was valid when the order was approved and accepted.—*Cummings v. Stone, 13 Mich., 72; Ellis v. Maxson, 19 Mich., 186.*

It is said, however, that plaintiffs intended to place this

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liquor in the hands of Kling to be sold in violation of the law of this state, and therefore they cannot recover. It would be a sufficient answer to this position to say, that the court has not found that the plaintiffs had any such intention. As already said, we cannot presume illegality. There being no evidence or finding in the case as to what the actual intention of the plaintiffs was, we cannot presume that the plaintiffs in making a sale which we must presume was valid in the state where they resided, and where the contract was entered into, thereby intended to assist the purchaser in violating the law of this state.

The judgment must be affirmed, with costs.

The other Justices concurred.

Joseph Kurtz v. The People.

Sunday liquor law: Statute construed: "Closed." The term "closed" in the statute of 1875, providing that all saloons, etc., and all places of public resort where intoxicating liquors are sold, shall be *closed* on Sundays, and between eleven and six in the night time, means at least that the sales shall be entirely stopped and the traffic shut off effectually, so that drinking, and the conveniences for drinking, shall be no longer accessible, and that those who frequent the places for that purpose shall be dispersed.

Constitutional law: Titles to acts: Sunday liquor law: Sales to minors, etc. Provisions for the punishment of Sunday and night sales of liquors to persons not minors, drunken persons or habitual drunkards, in an act entitled one to prevent the sale or delivery of intoxicating liquors, etc., to minors, drunken persons and habitual drunkards, etc., do not come within the constitutional inhibition (*Art. IV., § 20*) that "no law shall embrace more than one object, which shall be expressed in its title."

Constitutional law: Titles of acts: Means adapted to the object named. This provision of the constitution was intended to prevent legislators from being entrapped into the careless passage of bills on matters foreign to the ostensible purpose of the statute as entitled; but it is not designed to require the body of the act to be a mere repetition of the title, nor to preclude the introduction of such means as are reasonably adapted to secure the object indicated by the title.

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KURTZ v. PEOPLE.

Legislation: Title of acts: Cognate subjects. The closing of saloons on Sundays and in the night is not so far foreign to the subject of preventing the sale of liquors to minors, drunken persons and habitual drunkards, as to authorize the courts to hold that the legislature are going beyond their province in acting upon the common sense assumption, that permitting drinking places to be kept open on Sundays and late at night is likely to induce or favor the tempting of youths and drunkards into drinking and intoxication.

Heard January 11. Decided January 18.

Error to Recorder's Court of Detroit.

Otto Kirchner, for plaintiff in error, cited: *Ryerson v. Utley, 16 Mich., 269; Mewherter v. Price, 11 Ind., 199; State v. Powers, 14 Ind., 195.*

Andrew J. Smith, Attorney General, for the People, cited: *Sears v. Cottrell, 5 Mich., 251; Tabor v. Cook, 15 Mich., 322; Tyler v. People, 8 Mich., 321; People v. Gallagher, 4 Mich., 244; Newland v. Marsh, 19 Ill., 384; People v. Supervisors, 17 Mich., 241; County v. Mayor, 1 Seld., 285; Guilford v. Cornell, 18 Barb., 640; 4 Seld., 241; Murphy v. Menard, 11 Texas, 673; Walker v. Caldwell, 4 Am. R., 298; Dans v. State, 7 Md., 151; Washington v. Murry, 4 Cal.; People v. Mahoney, 13 Mich., 481; Inkster v. Carver, 16 Mich., 484; People v. Ins. Co., 19 Mich., 392; Cooley Const. Lim., 146.*

CAMPBELL, J:

Plaintiff in error was convicted of keeping open on Sunday his saloon for the sale of intoxicating liquors at retail, and of selling such liquors at retail on that day. The conviction was under *section 1* of "an act to prevent the sale or delivery of intoxicating liquors, wine and beer, to minors, and to drunken persons, and to habitual drunkards; to provide a remedy against persons selling liquor to husbands or children in certain cases," approved May 3, 1875.

The clause under which he was convicted is as follows:

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"All saloons, restaurants, bars, bar-rooms, in taverns or otherwise, and all places of public resort where intoxicating liquors are sold, either at wholesale or retail, shall (unless otherwise determined and directed by the board of trustees or common council of the village or city where such saloons, restaurants, bars or bar-rooms are kept) be closed on the first day of the week, commonly called Sunday, and on each week-day night, from and after the hour of eleven o'clock until six o'clock of the morning of the succeeding day. But this provision shall not be construed to prohibit druggists from selling such liquors at such times, upon the written request or order of some practicing physician of the town, village or city. Any person who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon a conviction thereof shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, and costs of prosecution, and on failure to pay such fine and costs shall be imprisoned in the county jail not less than ten nor more than ninety days, or both such fine and imprisonment, in the discretion of the court."

The first part of the section prohibits sales to minors and drunkards, and sales made by persons who have not filed a bond under the act.

It is claimed by the plaintiff in error that the provision under which he was convicted is invalid, because that provision is not within the title of the act, if applied to such cases as his, where the sale is not made to minors or drunkards; and that if meant so to apply, the act is void, under that clause of the constitution which requires that "no law shall embrace more than one object, which shall be expressed in its title."

It is claimed that the statute so construed is a law to enforce the proper observance of Sunday, and that no such purpose is disclosed in the title.

There is no question now presented concerning the somewhat extraordinary proviso, which seems to be based on the

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idea that a municipality can be allowed to suspend the penal laws of the state; as the complaint negatives any such attempt on the part of the city of Detroit, where this conviction was obtained. The case stands before us on the statute alone.

There is no ambiguity in the statute. It very clearly intends to close up the places named against liquor selling, on Sundays, or after eleven at night. It is not important on this record to examine critically into the meaning of the term "closed," as applicable to houses, rooms, or parts of rooms. It is clearly meant that the sales at least shall be entirely stopped, and the traffic shut off effectually, so that drinking, and the conveniences for drinking, shall be no longer accessible, and those who frequent them for that purpose shall be dispersed. Common sense will dispose of such cases readily enough. Every body knows practically what closing a saloon or drinking place means, and there is no occasion for seeking or solving imaginary difficulties.

We are brought, then, to the question whether under such a title as that of the act in question, the legislature can punish Sunday or night sales to persons not minors, drunken persons or habitual drunkards.

Nothing but our respect for what we understand to be the doubts of some judicial officers in regard to this statute, has induced us to deem it proper to do more than refer to the numerous cases heretofore decided on the meaning of the constitutional provision. It is a very wise and wholesome provision, intended to prevent legislators from being entrapped into the careless passage of bills on matters foreign to the ostensible purpose of the statute as entitled. But it is not designed to require the body of the bill to be a mere repetition of the title. Neither is it intended to prevent including in the bill such means as are reasonably adapted to secure the object indicated by the title. It would not be profitable to discuss those extreme cases where the adaptation of means to ends is so far-fetched and unnatural as to be directly and palpably misleading. This case presents, in our view, no such difficulties.

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The legislature assume that the opening of drinking places on Sundays and late at night is likely to induce or favor the tempting of youths and drunkards into drinking and intoxication. If there is any possible ground for holding that belief, it certainly is no function of a court to determine that the legislature were mistaken. It is their view, and not ours, which must determine the value of such an opinion. But if we were to be called on to express the views which belong to the other department of the government, we think it is not only possible, but obvious from all human experience, that they have judged reasonably. Dissipation is very closely connected with idleness, and brought on by its temptations. It is the use of leisure which determines character more than any thing else. The daily experience of mankind is open to courts and legislatures as it is to others. The time when persons are unemployed, and perhaps weary, is the time when they are most easily led astray. The records of police courts indicate beyond doubt that when places of resort for drinking are open on Sundays or other days of leisure they are sure to be liberally patronized by the classes who have least control of their appetite. The tendency of those who have begun to drink, to go on with drinking when opportunities are before them, is known to all. The pressure of business, and the performance of such duties as keep the mind occupied, may and will control those who cannot so easily control themselves when those checks are removed. The continuance of lounging and drinking into the late hours of the night is equally known as peculiarly dangerous. Men or boys can escape observation more readily by night than by day. When they have once become engaged in the pleasures and temptations of such resorts, it is but too sadly manifest to all who do not shut their eyes to what is going on around them, that after drinking has once begun by those who are in danger of excess (if there are any that are not), it is apt to be kept up much longer than may have been thought of or intended. "Midnight revels" would never have become

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a popular phrase unless they had been a well known reality. Unless the annals of crime are strangely distorted, the amount of mischief due to the indulgence of late drinking is much beyond its proportion in any other part of the day. There is certainly a decided impression that such is the fact; and if the legislature, like other persons, have been impressed with its truth, we are not prepared to say that it is such a palpable error as to show they cannot be regarded as acting within their province in accepting it. We think the objection to the law without foundation.

The judgment must be affirmed.

The other Justices concurred.

Henry Shermer v. David B. Merrill and another.

Foreclosures: Sale subject to future installment: Mortgagees: Purchasers. Mortgagees holding several mortgage notes falling due at different dates and secured by the same mortgage, who have foreclosed by advertisement when only a part of the notes were due, under a notice of a sale to be made subject to another note specified, and have themselves become purchasers, received a deed and had the same recorded, cannot, after default in redemption, maintain an action against the mortgagor upon the note subject to which the foreclosure sale was made.

Foreclosure sales: Mortgagees: Purchasers: Sale subject to future installment: Subrogation. Mortgagees who become purchasers at a foreclosure sale stand in no better position than a third party who becomes such purchaser; and if a third party purchase subject to another note which is a charge upon the land, the mortgagor, if compelled to pay such note to the mortgagee, would be entitled to be subrogated to the rights of the mortgagee under the mortgage, in order to subject the land charged with the payment of the debt.

Multiplicity of suits: Counter claims. A court of law will endeavor to prevent circuity and multiplicity of suits, where the circumstances of the litigant parties are such that, on changing their relative positions of plaintiff and defendant, the recovery by each would be equal in amount.

Heard January 13. Decided January 18.

Error to Kalamazoo Circuit.

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Arthur Brown, for plaintiff in error.

May & Mason, for defendants in error.

MARSTON, J:

July 18, 1870, Shermer executed and delivered to Merrill and McCourtie three promissory notes, respectively falling due in one, two and three years from the date thereof, the one falling due in three years being for the sum of two hundred dollars with ten per cent. interest payable annually. He at the same time, in order to secure payment of these notes, executed a mortgage to Merrill and McCourtie. After the two first notes, but before the third became due, Merrill and McCourtie foreclosed this mortgage by advertisement. The notice of sale contained this clause: "This foreclosure and sale is made subject to another note, secured by said mortgage, for the sum of two hundred dollars, and interest thereon at ten per cent. from January 18, 1870." The mortgagees became the purchasers at said sale, having bid the amount due on the two first notes and costs of foreclosure. The premises were not redeemed. The purchasers received a deed, and had the same recorded April 26, 1873, and afterwards brought an action against Shermer to recover the amount of this third note, and judgment was rendered in their favor for the amount thereof. Shermer removes the case to this court on writ of error, and insists that the mortgagees having purchased the land subject to this note, and having afterwards obtained a deed therefor, they cannot thereafter maintain an action upon the note.

The debt for which the note in question was given was a lien upon the land, which was sold subject to its payment. The intention was clear, and such must have been the understanding, that in case a third person became the purchaser, and the mortgagor should not redeem, the mortgagee, when this note became due, if it was not paid, might proceed to foreclose and again sell this land in order to obtain pay-

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ment of the note. Such would be the legal effect and result of such a sale. The purchaser would hold the lands subject to the payment of the note secured thereon. Under such circumstances it is quite clear that parties present at the sale contemplating a purchase would take into consideration the fact that they might thereafter be called upon to pay the outstanding note, in order to protect their title to the lands in case they became purchasers. They would not, therefore, be likely to bid the full value of the lands unincumbered, but the value subject to the incumbrance; so that the land would bring just the amount of the note subject to which the sale was made, less than it otherwise would have done. Under such circumstances, should the mortgagee sue the mortgagor upon the note and recover judgment, the mortgagor, upon payment thereof, would be entitled to be subrogated to the rights of the mortgagee under the mortgage, in order to subject the land charged with the payment of the debt. Were it otherwise, the mortgagor would be in effect paying the debt twice; once by a sale of his land for a sum the amount of the outstanding debt less than it otherwise would have brought, and then afterwards by paying the note. It is said that the mortgagor could avoid this result by redeeming the land. True, if he had the ability he might in this way protect himself; but this is not his only remedy. Where the sale has been made subject to one or more installments, he need not redeem, but may insist that payment thereof shall be made out of the land upon which, by the terms of the mortgage and sale, they have been expressly made a charge. It must, in such cases, be conclusively presumed that the land sold for the amount of the unpaid notes less than it otherwise would have done.

The mortgagees having become the purchasers stand in no better position than a third party would under like circumstances. If a third party purchasing the land at such a sale would take it subject to the payment of future installments, not then due, the mortgagees, in case they pur-

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chased, would take it subject to a like charge. The fact that they are mortgagees and holders of the notes gives them no superior rights and privileges at such a sale. They take the land upon the same terms and subject to the same charges which third parties would. It is urged, however, that admitting and notwithstanding all that has been said, the mortgagees may still pursue their remedy against the mortgagor upon the note the same as though a third party, and not they, had become the purchaser at the mortgage sale. We have seen, however, that where the mortgagor is thus compelled to pay the note, he is entitled to be subrogated to the rights of the mortgagee under the mortgage, and that he thus has a remedy over against the land. What good reason then is there for permitting the mortgagees to collect the note by a suit at law, if the mortgagor can thereupon turn around and commence proceedings to recover back a like amount by a sale of the mortgaged premises bid in by the mortgagees?

"A court of law will endeavor to prevent circuity and multiplicity of suits, where the circumstances of the litigant parties are such that, on changing their relative positions of plaintiff and defendant, the recovery by each would be equal in amount."—*Broom's Maxims, 337.*

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

Harriet Campbell v. John Quackenbush.

Chattel mortgage: Replevin: Mortgagor's wife: Demand. One holding a mortgage of a span of horses remaining in use on the farm of the mortgagor's wife where they both reside together, cannot, on breach of condition of the mortgage, bring replevin against the wife alone, without first making a demand of her.

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CAMPBELL *v.* QUACKENBUSH.

Lawful possession: Replevin: Wrong-doer: Affirmative action. The horses in question being lawfully on the farm, and so in the wife's possession, she cannot be charged as a wrong-doer in relation to them until she has taken some affirmative action; and the absconding of her husband, leaving the horses on the farm, could not of itself make her a wrong-doer.

Evidence: Statements of defendant's husband. In an action against the wife alone, evidence of statements or acts by her husband in other cases, not shown to have been made or done in her presence or with her knowledge, is entirely incompetent.

Submitted on briefs January 13. Decided January 18.

Error to Hillsdale Circuit.

E. L. & M. B. Koon, for plaintiff in error.

George A. Knickerbocker, for defendant in error.

COOLEY, CH. J:

The controversy here relates to the title of a span of horses. The defendant in error claims them by virtue of a chattel mortgage given by Harvey Campbell, the husband of the plaintiff in error. Harvey Campbell lived with his wife on her farm, and the horses were there, and in use. Quackenbush, claiming that a breach had occurred in the condition of the mortgage, replevied the horses without previously making any demand for them. The court below held that no demand was necessary.

We think this was erroneous. The horses were rightfully on the farm, and Mrs. Campbell, who was the owner of the farm, could not be deemed wrongfully in possession until she had refused on demand to surrender them. Her claim that she owned them was not in itself a wrongful act, and could not subject her to a suit. The mortgagee of her husband was at least bound to present his claim and see whether she would recognize it or not, before he could lawfully subject her to the costs of a suit.

We are referred, in support of the ruling, to *Trudo v. Anderson, 10 Mich., 357;* but in that case the possession of the defendant was, as to the plaintiff, a wrongful possession. In this case the horses had remained where they

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were left by the mortgagee himself in taking his security, and the only change that had taken place in the position of any of the parties was that which had occurred in the absconding of Harvey Campbell. But this of itself could not make the wife a wrong-doer: if she was not a wrong-doer by reason of the horses being on her farm before his absconding, she was not so afterwards until some affirmative action had been taken by her. The case of *Ballou v. O'Brien, 20 Mich., 304,* to which we are also referred, was, like the previous case, one of wrongful possession.

As this will dispose of the case on a new trial, it seems hardly necessary to go farther; but it may be proper to say that much evidence was received of what had been done by the husband and said by him in other cases, which was entirely incompetent. Testimony of that nature could not be received against this defendant unless the acts or statements testified to were done or made in her presence or with her knowledge.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

The Attorney General on the relation of James M. Foster v. The Board of Supervisors of Lake County.

Equity practice: Motion to dismiss: Proofs: Final hearing: Decree. It is irregular to dismiss a bill in equity, on motion, for want of jurisdiction, upon grounds required to be supported by proofs, except it be accomplished by way of what may be treated as a final hearing upon pleadings and the facts brought in by stipulation.

Chancery appeals: Jurisdiction; Questions of regularity. On appeal from a decree dismissing a bill for want of jurisdiction, questions of regularity of practice will not avail where the appellate court agrees with the court below on the main question of lack of jurisdiction.

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ATTORNEY GENERAL v. SUPERVISORS OF LAKE COUNTY.

County seat: Removal: Notice: Clerk: Supervisors: Ratification. Proceedings for the removal of a county seat are not rendered invalid by reason of the board of supervisors leaving the giving of the requisite notice to the clerk, without prescribing its form or contents, where no mischief is shown to have resulted, and the notice given was in due form, and the supervisors have sanctioned and ratified what was done by canvassing the votes and declaring the result.

Removal of county seat: Supervisors: Motives: Local contributions. It is not improper for the supervisors, while considering the question of removing the county seat, to take into the account any local provisions that may be made to relieve the county from the expenses incident to the removal; and where they have passed an unconditional resolution for removal, and the people have voted upon and approved it, no inquiry into motives, either of the supervisors or the people, can be gone into to invalidate the proceedings.

Removal of county seat: Political question: Private parties. The question of the removal of a county seat is purely a political question, and does not in any way legally involve the rights of private parties; and if the removal is effected in the manner provided by law, that is conclusive.

County seat: Removal: Decision of supervisors conclusive: Illegal votes. Under our statute (*Comp. L. 1871, § 485*) the decision of the supervisors, in declaring and entering upon their records the result of their canvass of the votes upon a proposition for the removal of the county seat, is conclusive for all purposes whatever, and leaves no question open to contest afterwards; and the removal cannot thereafter be defeated in the courts by a showing that it was carried by illegal votes.

Heard January 14. Decided January 18.

Appeal in Chancery from Lake Circuit.

Andrew J. Smith, Attorney General, S. F. Dwight, and *Hughes, O'Brien & Smiley,* for informant.

White & Haight, for defendants.

COOLEY, CH. J:

The purpose of the information in this case was to obtain an injunction to restrain the removal of the county seat of Lake county from Chase to Baldwin. The information shows a resolution of the board of supervisors for fixing the county seat at Baldwin, and a submission of the question of the removal to the voters of the county. It also shows a vote taken in favor of the removal, but alleges that the majority was secured by illegal votes. It denies that since the election the board of supervisors have taken any further action to complete the removal, but avers that certain par-

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ties have taken the records and office furniture of the county treasurer's and sheriff's offices and removed them to Baldwin without any legal authority.

The defendants filed their answer, but subsequently moved to dismiss the case for want of jurisdiction. For the purposes of that motion the proceedings of the board of supervisors were put in evidence by stipulation, and they showed a proper resolution for the removal of the county seat, adopted after negotiations with the townships particularly interested in the removal, and with certain persons named, designed to secure donations to the county of lands on which to erect county buildings, and of funds for their erection. They also showed a resolution by the board that the county clerk make the necessary arrangements for submitting to the electors of the county the proposition for the removal of the county seat, the publication of notice by him for the purpose, and the canvass of votes cast at the township elections in April, 1875, with a favorable result.

Upon this motion, and with the proceedings of the supervisors thus brought before the court by stipulation, the bill was dismissed, and the relator appealed. One of the objections made to the decree of dismissal is, that the proceeding was in violation of established practice, which would preclude the questions which must have been considered on the motion from being brought to the attention of the court otherwise than by demurrer, or on final hearing on pleadings or pleadings and proofs.

If this was not a hearing by consent on pleadings and on facts brought in by stipulation, it was certainly irregular. But the question of regularity cannot now be very important if the court below was correct in holding that the information made out no case for relief. We could not reasonably be expected to do so futile a thing as to send back a case for rehearing if the only complaint was that the court had prematurely discovered its want of jurisdiction. We shall therefore proceed to an examination of the case with a view to a determination of the jurisdictional questions.

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The information appears to rely upon three grounds: *first,* that the board of supervisors left the giving of notice to the clerk, instead of prescribing the form and contents of the notice for him; *second,* that the board took their action on considerations which were not submitted to the people, that is to say, on the negotiations with towns and people interested; and, *third,* that by reason of illegal votes the canvass did not show a true expression of the will of the electors. The first two objections, it is claimed, are made good by the records; the third the relator demands a right to establish by evidence.

We are not prepared to say that there is any force in the first objection. It must certainly be a very idle ceremony for the board of supervisors to prescribe for its clerk the form and contents of a notice in a case so simple as this. And even if this were in strictness requisite, the objection is so technical and insubstantial that it ought not to prevail unless it appears that mischief has resulted from the neglect to give the proper direction, or that the board, with whom the discretionary authority in the premises rested, has failed to recognize and ratify what was done. Nothing of the kind appears here. Notice in due form was given, the election was held, and the supervisors sanctioned what had been done by canvassing the votes and declaring the result. This we think was sufficient.

The second objection was not well taken. There is nothing improper in a board of supervisors, who are considering the question of removing a county seat, taking into the account any local provisions that may be made to relieve the county from the expenses incident to the removal. If they finally pass an unconditional resolution for the removal, and the people vote upon and approve a like unconditional proposition, that is sufficient. No inquiry can be gone into in order to determine what it was that influenced the minds, of either supervisors or people, in reaching the conclusion they have agreed upon.

The right of the relator to go into evidence to show that illegal votes were cast, must depend upon the statute. The

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question of the removal of a county seat is purely a political question, and does not in any way legally involve the rights of private parties. If the removal is effected in the manner provided by law, that is conclusive. The question on this branch of the case is therefore a question of statutory construction, and perhaps nothing more.

The constitution *(Art. X, § 8)*, provides that "no county seat once established shall be removed, until the place to which it is proposed to be removed shall be designated by two-thirds of the board of supervisors of the county, and a majority of the electors voting thereon shall have voted in favor of the proposed location, in such manner as shall be prescribed by law." The statute, after providing for the proper submission of a proposition duly adopted by the supervisors, and for the voting thereon, and the canvass of the votes by the township canvassers, and the making out of proper statements and certificates of the result, proceeds to say: "and the board of supervisors, for the purpose of ascertaining the result of such vote in such county, shall examine such statements and certificates, and canvass the votes therein certified, and shall determine and declare the result of the vote in the county, and such result shall be entered upon their records; and in case the result shall be in favor of the proposed removal, they shall provide for such removal, together with all the records and papers of such county, within one year after such result shall be ascertained and determined as aforesaid by them, and shall remove the same as soon as suitable buildings shall have been provided for the reception thereof, and they shall enter upon their records the time when such removal shall be deemed to have taken place, and from and after that time the place so designated shall be and continue the county seat of said county for all purposes whatsoever."—*Comp. L., 485.*

It is impossible, as it seems to us, to give due force to this language, without holding that the decision of the supervisors was meant to be, and must be, conclusive. There

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is no intimation that any right to contest it was to be left open afterwards; but their action is to settle the question of the removal "for all purposes whatsoever." It could not settle that question if a judicial review were still the right of dissatisfied parties. The question was one of a nature peculiarly proper to be submitted finally to their determination, and this consideration is not without its force when the question is one of construction.

But there are other considerations bearing in the same direction which may be well illustrated by the present case. The diligence of the relator enabled him to present his complaint before the removal to Baldwin had been perfected, but that is a circumstance that may not exist in the next case that arises. The circuit judge is required to hold his courts in the court house provided for him *(Comp. L.*, § *4942)*, and he cannot lawfully hold them elsewhere, except when the county has no court house at all. The officers of the court, the sheriff and clerk, are required to keep their offices and records at the county seat. If the circuit court in chancery could take cognizance of this case, it can of any similar case, and perhaps in the next case, sitting at the new county seat, it will be called upon by information to make solemn decision that it has no authority to decide, and to take jurisdiction for the purpose of holding that sitting where it does it has no jurisdiction at all. This would be the anomalous and absurd position in which a judge might be placed if he should assume to take cognizance of such a question.

We are of opinion that the question whether a majority of votes was cast for the removal of the county seat is concluded by the canvass and declaration of the supervisors, and that the relator has no just ground of complaint in the dismissal of his information.

The decree of dismissal will be affirmed, with costs against the relator.

The other Justices concurred.

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Patrick M. Danaher v. William Garlock.

Contractor: Sub-contractors: Agency: Authority: Contract relations: Ratification. Where sub-contractors have no authority to pledge the credit of their contractor for the board of their men, the mere fact of payment of a prior board bill upon the order of the sub-contractors, will not create any liability to pay subsequent bills; and in the absence of any showing of an original undertaking by such contractor, or of any act of ratification of any arrangement made by the sub-contractors, no recovery can be had against the former for such board bills incurred by the latter.

Heard January 14. Decided January 18.

Error to Mason Circuit.

Danaher had a contract to construct a portion of the Flint & Pere Marquette Railway, and sub-let a portion of the work to Fahy & Dye. This action was brought to charge Danaher with payment of certain indebtedness to Garlock incurred by Fahy & Dye for the board of their laborers. The evidence showed, among other things, the payment by Danaher's agent of a previous board bill upon the order of Fahy & Dye. The plaintiff recovered judgment, and defendant brings error.

White & Haight, for plaintiff in error.

Fitch & Newcombe, for defendant in error.

PER CURIAM:

We think there is no material distinction between this case and *Wells v. Martin, 32 Mich., 478,* as to the proof introduced to show liability.

We discover no evidence in the record tending to show an original undertaking by Danaher, or any act of ratification of any arrangement which Fahy & Dye may have made, and the bill of exceptions states that the substance of all the testimony given is set out; and the judge, after refer-

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ring in his charge to the evidence supposed to bear on the point, stated that it was substantially the testimony produced by both parties.

The judgment should be set aside, with costs, and a new trial ordered.

William Weaver v. The People.

Criminal law: Suspended sentence: Sentence by another judge. Where, upon a plea of guilty to a charge of malicious injury to a dwelling, sentence has been suspended by the trial judge until the next term, and the prisoner let to go on his own recognizance in a merely nominal sum, and the subsequent term has passed without any further steps being taken, it is not competent for another judge, holding the court temporarily, to sentence such offender to imprisonment in the state prison; such action is to be considered not merely as supplying the trial judge's omissions, but as practically overruling his decision.

Submitted on briefs January 14. Decided January 18.

Error to Van Buren Circuit.

W. Scott Beebe, for plaintiff in error, cited: *Comp. L., §§ 4951, 7997; 20 How. Pr., 118; 20 Wis., 61; 1 Chitty Cr. L., 696-9, 701-4; 2 Hale P. C., 404-5.*

Andrew J. Smith, Attorney General, for the People.

CAMPBELL, J:

Weaver, on the 8th day of July, 1874, pleaded guilty to a charge of malicious injury to a dwelling. The case was pending in the circuit court for the county of Van Buren, and the plea was put in before Hon. J. W. Stone, circuit judge. On the same day Judge Stone suspended sentence until the first day of the next term, which was the first Monday of October, 1874, the respondent being allowed

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to give his own recognizance to appear at that day, in the sum of one hundred dollars. The sentence was not further suspended, nor the recognizance forfeited, and defendant was not called up for sentence at the return term, but continued at liberty. On the 25th day of October, 1875, Judge Tennant, a judge of another circuit sitting temporarily, sentenced Weaver to two years and six months imprisonment in the state prison. On this error is brought.

It is not necessary in this case to discuss the power of a different judge to give sentence where it has been omitted, and where it does not appear that such omission was designed to interfere with punishment. There has been some dispute as to the best course to pursue under such circumstances. *Lord Hale*, not considering the abstract question, said it was not his custom to give such sentences in cases of felony. But generally the question seems to become important in view of some action or expression of the trial judge indicating his sentiments. It is said with much force that inasmuch as there can be no sentence without the joint belief of the jury in the prisoner's guilt, and of the judge in the deserts of the offender, where he has any discretion to exercise, the views of the judge are to be respected.

In the present case there was no fixed penalty. It might be imprisonment in the state's prison, or it might be a short imprisonment in the county jail, or a fine not exceeding five hundred dollars, but with no minimum amount required to be imposed. In other words, it was recognized by the legislature that such offenses might be of trifling enormity, and not worthy of serious notice.

Sentences may be suspended for various purposes. It may be for the purpose of allowing steps to be taken for a new trial, or other relief, or it may be with a view of letting the offender go without punishment. The release of a defendant on his own recognizance and without sureties, in a merely nominal amount, signifies usually the latter purpose. It at least is a plain assertion of the judge that he did not regard the offense as one that should receive a serious punishment.

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The failure to take steps during the October term of 1874 was a practical abandonment of the prosecution, and corroborates the opinion that such must have been understood as the object of the suspension, and as the record stands, it is fairly to be inferred it was intentional. To sentence a prisoner to the penitentiary under such circumstances, and when the trial judge has distinctly said he ought not to be so sentenced, is not supplying his omissions, but is overruling his decision. This we think not admissible, and the sentence was unauthorized, and the judgment must be reversed, and the prisoner discharged.

The other Justices concurred.

The Detroit Fire & Marine Insurance Company v. Henry Renz and others.

Equity practice: Appeals: Foreclosures: Sales: Order of confirmation. An order confirming a sale on a foreclosure decree is held appealable.

Equity practice: Appeals: Discretion. Chancery appeals bring the case up for review with all matters of discretion open for consideration in the appellate court, precisely as they were in the court below.

Foreclosures: Sales: Filing bill: Subpœna: Discretion. Under the statute (*Comp. L. 1871, § 5147*) prohibiting a sale in foreclosure cases within one year from the filing of the bill, whether strictly an interval of a year is requisite in all cases between the service of subpœna and the sale, the court has discretionary power at least to postpone the sale until the expiration of a year from the service of subpœna, and should exercise it where the subpœna is not issued until nearly six months after the filing of the bill.

Equity practice: Decree: Notice: Settlement. Good practice requires that a defendant who has appeared in the cause should have such notice of the entry of the decree as to give him an opportunity to attend and be heard upon the settlement thereof.

Heard and decided January 19.

Appeal in Chancery from Wayne Circuit.

This was an appeal from the order of confirmation of a

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sale on a foreclosure decree. The bill was filed July 8, 1874, but no subpœna was issued till January 10, 1875. Defendants entered their appearance and filed an answer. The cause was heard on pleadings and proofs June 15, 1875, and a decree rendered authorizing a sale at any time after July 18, 1875. Sale was made under this decree July 29, 1875. The usual order *nisi*, for the confirmation of this sale, was entered. Exceptions were filed by defendants to the commissioner's report of sale, which were argued and overruled, and an order of confirmation of the sale granted and entered. From this order the defendants appealed.

Moore & Griffin, for complainant.

Otto Kirchner, for defendants.

PER CURIAM:

I. The order was appealable; and when a chancery appeal lies, it brings the case up for review with all matters of discretion open for consideration in the appellate court, precisely as they were in the court below.

II. The statute *(Comp. L., 1871, § 5147)* prohibits a sale within one year after the filing of the bill. Whether or not this strictly requires the interval of a year between the service of subpœna and the sale, the purpose certainly was to give the mortgagor time within which to make payment and save the lands; and that purpose is not served by permitting a sale within six months after he first has notice, by service of subpœna or otherwise, that a bill has been filed, even though the bill may in fact have been on file, but inoperative, for six months previous. The court has a discretionary power in such a case, at least, to postpone the sale until the expiration of a year from the service of the subpœna; and such a discretion ought to have been exercised in this case.

III. Good practice requires that a defendant who has ap-

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peared in the cause should have such notice of the entry of the decree as will afford him an opportunity to attend and be heard upon the settlement thereof.

Order of confirmation reversed, with costs, and re-sale ordered.

John D. Wright v. The People.

Criminal law: Assault with intent to murder: Written verdict: Intent to kill: Assault and battery: Sentence. Where, upon the trial of one charged with an assault with intent to commit murder, the jury brought in a written verdict finding the prisoner guilty of an assault with intent to kill, as charged, but that the shooting was done under great provocation, and recommending the prisoner to the mercy of the court, it was held that there being no such offense under our statutes as assault with intent to kill, the statutory offense being assault with intent to commit the crime of murder, the verdict cannot be construed as a finding that defendant was guilty of any thing more than an assault and battery, and that a sentence to imprisonment for seven years was unauthorized.

Heard and decided January 19.

Error to St. Clair Circuit.

Wright was tried on a charge of assault with intent to murder one Woodward, *alias* Wagner, at Port Huron. The jury, having received the charge of the court, retired in charge of an officer, and shortly afterwards returned into court for further instruction as to whether the prisoner could be convicted under the information of assault and battery merely. The charge being again read to them (which distinctly instructed them that if the killing, in case death had resulted, would have been any thing less than murder, the defendant was not guilty of the complete offense charged, but was at most guilty of assault and battery only, and that he might be convicted of that offense), they again retired. At about two o'clock in the morning the jury again returned into court, and being asked if they had agreed upon their

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verdict, the foreman handed to the clerk, and the clerk handed to the judge, a paper which the judge thereupon read aloud, and then said to the jury: "Gentlemen, you say that you find the prisoner guilty as charged in the information, and that you recommend him to the mercy of the court; and so say you all;" to which the jury nodded assent; and the verdict so given was recorded and the jury discharged. The paper which the jury handed in contained in writing, signed by all the jurors, the following: "We find the prisoner, John D. Wright, guilty of assault with intent to kill William Wagner, as charged in the information; also that the shooting done by Wright was done under great provocation, and we would recommend the prisoner to the mercy of the court." The court sentenced him to be imprisoned in the state prison for seven years.

Atkinson Bros. and *A. E. Chadwick*, for plaintiff in error.

A. R. Avery, Prosecuting Attorney, A. J. Smith, Attorney General, and *W. T. Mitchell,* for the People.

THE COURT held that the written finding of the jury must control under the circumstances disclosed by this record as to what their real verdict was; that there being no such offense under our statutes as an assault with intent to kill, the statutory offense being an assault with intent to commit the crime of murder, this written verdict cannot be construed as a finding that defendant was guilty of any thing more than an assault and battery; and that the sentence, therefore, was one not authorized by the verdict.

Judgment reversed, and prisoner discharged.

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John Jourden v. James J. Boyce and another.

Promissory notes: Alteration: Evidence: Charge to the jury. Evidence in an action upon a promissory note, that the only note of the kind that defendant ever signed was payable in two years, while the note sued upon and produced in court was payable in four months, is evidence fairly tending, if believed, to prove an alteration of the identical instrument originally signed; and it will entitle the defendant to have the case submitted to the jury on that theory.

Written instruments: Alteration: Inspection: Question of fact. It cannot be assumed that the question whether an instrument has been altered is one that can always be determined by inspection; but it is a question of fact to be submitted to the jury in the light of all the evidence on the subject.

Heard and decided January 20.

Error to St. Clair Circuit.

This was a suit on a promissory note for one hundred and fifty dollars. The execution of the note was denied on oath. The note, when produced, was payable four months after date, and purported to be executed by Jourden by his mark and attested by one Terney. Plaintiffs introduced evidence tending to prove the execution by defendant of the identical instrument produced; and they were admitted to be *bona fide* purchasers. The defendant gave evidence tending to show that he gave but one such note, and that the note which he signed had two years to run.

The circuit judge refused to charge, as requested by defendant, that if defendant executed the note and it was afterwards materially altered, this would vitiate it and render it void, even in the hands of a *bona fide* holder; and that the alteration of the time of payment from two years to four months would be such an alteration as would vitiate the note and render it void. But he left the matter to the jury as if the only disputed question of fact in this regard was, whether the defendant had ever in fact executed the identical instrument sued upon, or had executed some other note, and not this. The verdict and judgment were for plaintiffs, and defendant brought error.

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JOURDEN v. BOYCE.

Atkinson Bros., for plaintiff in error.

Stevens & Thomas and *W. T. Mitchell*, for defendants in error.

THE COURT held that evidence that the only note of the kind defendant ever signed was payable in two years, while the note sued upon and produced in court was payable in four months, was evidence fairly tending, if believed, to prove an alteration of the identical instrument originally signed; and that the defendant had a right to have the case submitted to the jury on this theory; that it cannot be assumed that the question whether an instrument has been altered is one that can always be determined by inspection merely, but that it is a question of fact to be submitted to the jury in the light of all the evidence on the subject.

Judgment reversed, with costs, and a new trial ordered.

The People on the relation of The Port Huron & Gratiot Railway Co. v. Selden A. Jones.

Chancery appeals: Appealable orders: Contempt proceedings. An order adjudging one who had been illegally appointed a receiver in a chancery cause guilty of contempt in disobeying an order of the court requiring him to restore to the defendants in said cause all things that had come to his hands as such receiver, is held appealable.

Receiver: Void appointment: Restoration: Jurisdiction: Contempt. The appointment of such receiver having been determined by the supreme court to be utterly void for want of jurisdiction, it was lawful and proper for the court which made the appointment, to order the property of which the defendants had thus been unlawfully deprived to be restored to them, that they might be placed as nearly in *statu quo* as the nature of things would permit; and it was competent for the court to enforce such order by proceedings as for contempt.

Receiver: Void appointment: Restoration: Services: Compensation. One whose appointment as such receiver has been thus finally determined by the court of last resort to be void for want of jurisdiction, is not entitled, when ordered to account for and make restoration of the property which thus came unlawfully into his hands, to retain any thing for his services as such officer.

Heard and decided January 20.

Appeal in Chancery from St. Clair Circuit.

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The respondent was appointed receiver in a cause pending in said circuit court in chancery, wherein one Goulden was complainant and said company and others were defendants. The order appointing him receiver was afterwards held by the supreme court *(31 Mich., 456)* to be unauthorized and without jurisdiction, and was vacated by mandamus. Thereupon the circuit judge made an order in the cause that respondent turn over and restore to the company all property, money and effects received by him as such receiver. Respondent, while acting as receiver, had been conducting the business of the company, and upon being served with this order, he made a report of the property received and still held by him, and of the moneys collected and paid out, and credited himself with about five hundred dollars as compensation for his services. The defendants in the cause excepted to this report, and insisted that the respondent had no authority to retain compensation for his services. An application was made for an attachment against him for contempt of court in disobeying its order in the premises. Upon his showing cause and claiming the right to retain the money as compensation for his services, the court ordered an attachment to issue, and upon his still refusing to comply with the order by paying over the money, he was adjudged guilty of contempt, and was committed to the county jail until he should comply with such order. The respondent thereupon appealed.

The relator, on the hearing, moved to dismiss the appeal as unauthorized.

H. W. Stevens and *W. T. Mitchell*, for relator.

C. R. Brown and *O'B. J. Atkinson*, for respondent.

PER CURIAM:

I. The order was appealable. Such an appeal was sustained in *People v. Simonson, 10 Mich., 335.*

II. The respondent's appointment as receiver having

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been determined by this court to be utterly void for want of jurisdiction, it was lawful and proper for the court below, which, by making the appointment, had deprived the defendants in said cause of the lawful custody of their property, by an order that was unauthorized and void, to order the person into whose hands it had unlawfully placed it, to restore such property to the parties from whom it had been taken, and to place them as nearly in *statu quo* as the nature of things would permit. And it was competent for the court to enforce such order by proceedings as for contempt.

III. In so far as the respondent had expended the money of the company, which he had received in conducting the business, in the payment of expenses, and the salaries of employes for which the company would be holden, there being no objection urged to the allowance of these expenditures, it is proper he should be credited for them. But the charge for his own compensation was not a proper one to be allowed to come out of the fund thus collected.

Order affirmed, with costs.

William M. Eaton v. Esther E. Eaton.

Equity practice: Order pro confesso: Proof of service of subpœna. An order *pro confesso* entered before the proof of service of the subpœna has been made or filed, is premature and irregular.

Order pro confesso: Non-appearance of defendant: Affirmative showing. Good practice requires an affirmative showing of the non-appearance of the defendant, as a preliminary to an order *pro confesso*.

Heard and decided January 20.

Appeal in Chancery from St. Clair Circuit.

This was a bill for divorce, upon which a decree was granted as prayed, and an appeal taken. The subpœna was

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personally served. The bill was taken as confessed on October 7, 1875, the order *pro confesso* being based upon an affidavit of regularity made and sworn to on that day, and merely stating generally that all the proceedings to take the bill as confessed had been regular and according to the rules and practice of the court. The proof of service of the subpœna, however, was by affidavit not sworn to till October 8, 1875, and which was marked filed "as of October 7, 1875." The defendant's solicitors caused an appearance to be entered on October 7th, but afterwards, on the 14th, withdrew the same. On the next day, however, they entered their appearance again. On that day the case was brought to a hearing, *ex parte*, upon the bill taken as confessed and the proofs, and decree granted. Thereupon defendant moved to open the decree, making a showing that the withdrawal of the appearance on the 14th was in consequence of a misapprehension of instructions communicated to her solicitors by defendant by telegraph. This motion being denied, the defendant appealed.

Atkinson Bros., for complainant,

Miles & Coe and *W. T. Mitchell*, for defendant.

THE COURT held that the order *pro confesso* was premature and irregular; that it was not proper to enter such order before the proof of service of the subpœna was made and filed; and that, under the circumstances of this case at least, good practice required an affirmative showing that defendant had not appeared in the cause; that the order *pro confesso* being irregular, the subsequent steps taken in the cause cannot be sustained.

Decree reversed.

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Samuel D. Clark and another v. Gustave B. Lichtenberg.

Service in foreign county: Statute construed. Service in a foreign county under the statute (*Comp. L. 1871, § 5748*) is not authorized until after the record shows proof of service on some of the defendants within the jurisdiction of the court.

Proof of service: Certificate: Sheriff. A certificate of service with the venue laid in the county of Wayne and city of Detroit, and signed simply "John B. Kendall, sheriff," without specifying of what county, and certifying to a personal service upon defendants named, on a day specified, "in said county of St. Clair," is not sufficient proof of service.

Heard and decided January 20.

Error to Superior Court of Detroit.

This was an action upon a promissory note made by Clark & Kirchmaier and endorsed by Beckel Bros. & Simpson. The suit was commenced by declaration against the members of both firms. Service was made at Detroit on Moses Beckel on May 5, 1875, and was accepted on the same day by said Beckel for his brother and Simpson. The only proof of service on Clark & Kirchmaier was a certificate with the venue laid in the county of Wayne and city of Detroit, and signed by "John B. Kendall, sheriff," without specifying of what county, and certifying to a personal service on them on May 5, 1875, in "said county of St. Clair." The proof of service on the Beckels and Simpson was filed May 5, 1875, and that on Clark and Kirchmaier on May 8th. Default was entered on the 18th, made absolute on the 26th, and judgment taken against all the defendants on the 27th of May.

Clark and Kirchmaier brought error.

Miles & Coe and *W. T. Mitchell,* for plaintiffs in error.

Don M. Dickinson, for defendant in error.

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PER CURIAM:

This case is ruled by *Denison v. Smith, supra p. 155.* Service in a foreign county under the statute *(Comp. L. 1871, § 5748)* is not authorized until after the record shows proof of service on some of the defendants within the jurisdiction of the court. The most that this record can be claimed to have shown at the time of service on Clark and Kirchmaier in St. Clair county is, a service made on the other defendants within the jurisdiction, and proof thereof filed, on the same day that service was made on them in a distant county, without any showing as to which took place first. But, moreover, the certificate of service on Clark and Kirchmaier was insufficient as proof of such service.

Judgment reversed.

Chauncey Lott v. Jonathan Sweet and others.

Practice: Requests to charge: General charge. It is not error to refuse to grant requests to charge where all the points involved in the several requests which are proper to be given are covered by the general charge given by the court.

Magistrate: Conservator of the peace: Insane person: Arrest. It is just as competent for a magistrate, as conservator of the peace, to order into custody an insane man who is committing a breach of the peace in his presence, as to order the arrest of a sane person under like circumstances; though an insane person may not be guilty of crime, he may lawfully be prevented from doing harm.

Heard and decided January 20.

Error to Clinton Circuit.

This action was brought by Lott for an assault and battery and false imprisonment. The evidence tended to show that defendant Sweet was a justice of the peace, and that defendant Carpenter was a constable; that Sweet ordered

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Lott arrested, and that Carpenter, with the aid of defendant Clark, arrested him and took him before another justice, where complaint was made against him for an assault and battery upon his wife; that Lott's wife was in the street in the village of De Witt at about sundown, going from the residence of one Bennett to that of plaintiff, when plaintiff came up to her and told her to go into the house, and struck her with his hat two or three times; that plaintiff was noisy and boisterous, using vulgar and obscene language as to the conduct of his wife with other men, and profane language and demonstrations of violence, both in the street and in his house; that the disturbance raised a crowd in the house and yard to the number of thirty or forty, including the defendants; that plaintiff during the melee placed his hands on his wife's shoulders and forced her into a seat, and made a motion as if to strike her, when defendant Sweet caught his hand and ordered his arrest, directing the constable, Carpenter, to take him before Justice McFarlan in St. Johns, in another township; and that this was the assault and battery and false imprisonment complained of. It was shown also that plaintiff had been drinking, and did not know what he did, or what others did to him. It was claimed on behalf of plaintiff that he was insane at the time from the use of alcoholic liquors, and so not responsible for his actions, and should not have been arrested.

The plaintiff's counsel asked twenty different instructions, which were all refused, and the court charged, in substance, that if the plaintiff was committing a breach of the peace in Sweet's presence, the order of arrest was proper, and defendants were not liable; but that if there was no breach of the peace in his view at the time, the defendants would be liable; and that the jury, if they found defendants liable, could fix the damages at any sum not exceeding the amount claimed in the declaration which in their judgment would fully compensate the plaintiff for the injury done. The verdict was not guilty.

Plaintiff brought error.

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R. Strickland, for plaintiff in error.

Walbridge & Cook, for defendants in error.

PER CURIAM:

I. The charge of the court as given covered all the points involved in the several requests which were proper to be given, and was as favorable to the plaintiff as under the evidence was warranted, and the refusal to grant his requests was therefore not error.

II. It is just as competent for a magistrate, as conservator of the peace, to order into custody an insane man who is committing a breach of the peace in his presence, as to order the arrest of a sane person under like circumstances; though an insane person may not be guilty of crime, he may lawfully be prevented from doing harm.

Judgment affirmed.

Frank P. Kenyon and another v. Francisco P. Woodruff.

Fraud: Joint defendants: Concert of action: Evidence. Where one who as deputy sheriff has taken property at the request of one falsely claiming to be owner, and removed and delivered it to one asserted by the latter to have a valid chattel mortgage upon it, and been mulcted in damages therefor by the real owner, brings his action for the fraudulent misrepresentations, evidence that shortly after the removal of the property the pretended mortgagee stated to the plaintiff it had been stolen from him and he guessed it was on its way to Kansas, while in fact it was shortly thereafter in public use at the village where defendants both resided, is held admissible as tending somewhat to show a concert of action between defendants in running off and concealing the property.

Evidence: Advice of counsel: Hearsay. It is not error for the court to interrupt a witness who is proceeding, after objection by counsel on the other side, to testify to advice of counsel, which so far as the record shows appeared to be mere hearsay.

Fraud: Partial statements: Concealment of facts: Deceit. Designed partial

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statements which deceive, and concealment of facts such as to make those declared partial and misleading, are fraudulent in law.

Principal and surety: Fraudulently inducing another to commit a wrong. The relation of principal and surety grows out of the consent of all the parties; and the principles belonging to it, in respect to the right of recovery over, can have no necessary application to a case where one without intentional wrong on his part has been induced by the fraud of another to do an act for which he has been held accountable as for a wrong committed against a third party.

Fraud: Conversion: Measure of damages. Where parties by fraud have induced another innocently to convert the property of a third for their benefit, and have undertaken his defense of a trover suit brought by the latter, and have failed, and execution has been levied on his property sufficient to satisfy the judgment, the measure of damages in his action against them for the fraud, is the amount of the judgment against him, with interest, though he has not in fact paid such judgment.

Trover: Judgment: Title. The recovery in the trover suit would put an end to any right of the plaintiff therein to reclaim the property, and would leave the title in those at whose instance and for whose benefit the conversion was brought about.

Trover: Joint conversion: Judgment and execution against one: Election. A recovery and execution levy against one of several who were jointly guilty of conversion, precludes recourse against the others on account of the same conversion; the principle as to joint trespassers being applicable.

Heard January 7. Decided January 21.

Error to Saginaw Circuit.

W. A. Clark, for plaintiffs in error.

Dan P. Foote, for defendant in error, as to the measure of damages, cited: *Train v. Gold, 7 Pick., 379; Chicago v. Robinson, 2 Black, 418; Beers v. Pinney, 12 Wend., 309; Blasdale v. Babcock, 1 Johns., 516; Barney v. Dewey, 13 Johns., 224; Rockafellow v. Donnelly, 8 Cow., 639; Mayor v. Railroad Co., 49 N. Y., 659; Chace v. Hinman, 8 Wend., 454; Webb v. Pond, 19 Wend., 423.*

GRAVES, J:

Woodruff was deputy sheriff, and Kenyon called on him and requested him to seize two billliard tables on a chattel mortgage which he, Kenyon, had made to Goodale, and when taken, to send the tables to Goodale at Chesaning. A

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paper purporting to be a copy of a mortgage given on the tables by Kenyon to Goodale a long time before was shown, together with a certificate of filing by the township clerk. Kenyon made certain statements concerning the correctness of the transaction, and Woodruff seized the property, which was then in the care of the Michigan Central Railroad Company, and sent it to Goodale at Chesaning as requested. Subsequently one Schulenburg, claiming that the property was in him when Woodruff took it and sent it to Chesaning, sued Woodruff in trover, and counted on these doings by Woodruff as a conversion. Kenyon and Goodale together took upon themselves the defense of this suit brought by Schulenberg, but judgment passed against Woodruff for the value of the tables and costs.

Schulenberg subsequently sued out execution and caused it to be levied on lands of Woodruff worth many times the amount of the judgment, and in due time the land was sold on the execution for an amount sufficient to satisfy it.

In this state of things Woodruff sued Kenyon and Goodale in tort, and alleged that they brought him to take and send the tables to Chesaning by fraudulent representations respecting the character and history of the mortgage from Kenyon to Goodale, and claimed damages to the amount of the judgment obtained by Schulenberg, with the interest upon it.

Some time after this suit was brought, the sale on Schulenberg's execution was set aside on Woodruff's motion, for irregularity, and a new levy was very soon made on sufficient of Woodruff's lands to obtain satisfaction. That Woodruff was abundantly responsible for the amount, was proved and is not questioned. Woodruff's suit against Kenyon and Goodale was afterwards brought to trial, and the court, although the judgment against Woodruff had not yet been collected or paid, allowed him to recover an amount equal to Schulenberg's judgment, with the interest which had grown upon it.

Kenyon and Goodale now seek a reversal of that judgment on account of alleged errors committed on the trial.

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Several exceptions were taken to rulings admitting and rejecting evidence, but the counsel for plaintiffs in error notices but two in his brief, and abandons the rest.

We think neither of those referred to in the brief merit particular discussion. It may be well enough to advert to them. Woodruff went to Chesaning to see the parties about the tables, and he testified that Goodale told him he received them at the depot, and took them to his store and left them outside until evening, and then went out to find them, but they had been stolen, and he guessed they were on the way to Kansas. Further evidence being given to show that the tables were soon after put up and in use at Chesaning, Woodruff was permitted, under the objection that it was not material, to testify that not long after the statement of Goodale that the tables had been stolen, and that he guessed they were on the way to Kansas, they were in public use at Chesaning. It does not appear expressly how long this was after the alleged taking on Kenyon's request, but the facts tend to show it was shortly after. Kenyon and Goodale both resided at Chesaning. The evidence had some bearing upon the question as to whether those parties were acting in concert in running off and concealing the tables. Besides, evidence had been given already to the same effect, and on the admission of which no error is assigned. We think the exception should be overruled.

The point that the court erred in stopping Kenyon whilst proceeding to testify to some advice which his counsel, Mr. Clark, had given him is not well taken. We do not know what the advice was, or to what it related, as no offer or explanation seems to have been made. According to appearances, it would have been mere hearsay, and we are unable to conjecture any ground upon which it would have been proper to have permitted the witness to state it against objection; and the interruption by the court was after objection by counsel on the other side.

An inspection of the record discloses that the fraudulent representations relied on, and which were set forth in a

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pretty general way in the declaration, consisted in stating what was particularly and directly untrue, and also in stating but part of the truth in respect to other matters.

And the court in charging the jury referred to designed partial statements, and their intended tendency and influence, and in so doing spoke of concealment of facts which made those declared partial and fraudulent.

After a carefnl perusal of the evidence and the charge as a whole, we think the plaintiffs in error have no reasonable ground of complaint against the instructions to the jury, unless there was error in allowing the judgment against Woodruff, with the interest upon it, to be taken as a measure of recovery; and this is the substantial question in the case.

The counsel for plaintiffs in error claimed that the parties were as principals and surety, and that the position of Woodruff was analogous to that of surety for Kenyon and Goodale, and that he was not entitled to recover against them except upon the principle of compensation; and hence, as he had not paid the judgment obtained by Schulenberg, he was not entitled to recover the amount of it.

He also insisted that this latter judgment being still unpaid, Schulenberg may hereafter sue Kenyon and Goodale, or either of them, as co-wrong-doers with Woodruff.

There is no analogy between the relations of the parties in this controversy and the relations which exist between principal and surety, and there is no ground for applying the same reasoning.

The relation of principal and surety grows out of the consent of all the parties, and the principles which belong to it, in regard to the right of recovery over, can have no necessary application to a case where the relation does not arise from consent, but is caused by a positive wrong committed by one against another.

It would be very unreasonable to hold that when one is drawn by the fraud of another to perform an act which gives a third party a perfect right of action against him, and which

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has eventuated in a judgment which is indisputably collectible of him, the wrong-doer may still insist that his responsibility to the party he has thus by his fraud caused to be accountable to the third party, is required to be exclusively governed by those rules which naturally and justly apply where one by choice assumes a relation of accountability on behalf of one to another. The disparity between the cases is too obvious to justify a particular discussion.

In view of the facts and the finding it must be assumed that the plaintiffs in error, by means of a fraud they practiced, drew the defendant in error to convert the billiard tables for their benefit; that he acted innocently upon the faith of their representations by words and conduct, but thereby subjected himself to Schulenberg's action; that plaintiffs in error assumed the defense of that action, and implied that it was one they were bound to take care of; that final judgment was recovered, and defendant in error was, and is, entirely responsible; that prior to the beginning of this suit by Woodruff, Schulenberg had sued out execution on his judgment and caused it to be levied on land of Woodruff worth several times the amount.

The recovery of Schulenberg against Woodruff for the conversion of the tables put an end to Schulenberg's right to reclaim them *(Brady v. Whitney, 24 Mich., 154)*, and left them as the property of plaintiffs in error, at whose instance and for whose sole benefit the conversion was brought about.

And when, after his recovery in trover against Woodruff, Schulenberg sued out execution and proceeded to enforce collection of the judgment under it, he thereby elected to look to Woodruff alone, and barred himself against having recourse against Kenyon and Goodale, or either of them, on account of the same conversion. The rule was so settled in this court in *Boardman v. Acer, 13 Mich., 77*, in a case concerning joint trespassers, and the principle must equally apply where persons join in conversion.

The liability of defendant in error to Schulenberg is pos-

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itively fixed, and his responsibility is unquestioned. He cannot avoid paying the judgment. The plaintiffs in error have got the property through their fraudulent procurement of Woodruff's act of conversion, and the judgment against Woodruff for that conversion, and they are liable to no one except Woodruff. This suit is for the damage caused by the fraud of Kenyon and Goodale.

Under these circumstances, I think the court did not err in allowing Woodruff to recover damages to an amount equal to the judgment obtained against him by Schulenberg, with the interest upon it, and that the judgment of the circuit court should be affirmed, with costs.

The other Justices concurred.

George W. Robinson and another v. Edwin W Worden.

Partnership: Dissolution: Evidence: Notice. In an action to charge two defendants as partners with the payment of plaintiff's services in running a shingle mill previously owned by both as a firm, but then belonging to one only, reports of a scaler employed by plaintiff, wherein the mill is described by the name of the one defendant alone, and which were made for the purpose of enabling the plaintiff to settle with the boom company for boom charges, are held admissible in evidence as tending somewhat to show notice to plaintiff that the mill business was being carried on on such defendant's individual account, and not, as formerly, by the firm.

Heard January 11 and 12. Decided January 21.

Error to Manistee Circuit.

Bullis & Cutcheon and *Norris & Uhl,* for plaintiffs in error.

Fowler & Harley, for defendant in error.

GRAVES, J:

From about the last of April or first of May, 1873, dur-

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ing the season, defendant in error ran a shingle mill, and he sued plaintiffs in error for his services and got judgment, and they asked to have it reversed for rulings at the trial. He claimed that he worked the mill under an express contract made the last of April with the plaintiffs in error, who were partners, or appeared to be such, and that he thus contracted through Briggs alone, who told him they were in partnership, and upon which statement he relied. Robinson and Briggs denied that they were partners at the time in question, and insisted that the former partnership connection between them was dissolved on the 21st of December, 1872, and that Worden had notice the partnership was not subsisting. Briggs also denied that he told Worden the partnership with Robinson was existing, and denied that he assumed to contract otherwise than in his individual character. Much evidence was adduced to prove and disprove the existence of the partnership in April, and prior and subsequent thereto, and in regard to publicity and notice of dissolution, and to affect Worden with notice that there was no partnership and that Briggs was going on alone. As tending to show such notice, plaintiffs in error offered in evidence a series of reports, beginning very early in May, 1873, and extending into October, made under oath by one Hayes to the boom company, and purporting to show the scalage of the logs at the shingle mill, and in which reports the mill was described as the "A. W. Briggs" mill, and not as one being run by a firm. Prior to December, 1872, it had been run by A. W. Briggs & Co., and which firm was then composed of plaintiffs in error. This offer of proof was accompanied by a further offer to prove that Hayes in making these reports acted as Worden's agent. The court sustained an objection to the offer. Evidence was subsequently given tending to show that Hayes was employed by Worden to make these reports, and was in his service in making them, but that the object of making them was to enable *Briggs* (not plaintiffs in error) to settle with the boom company for boom charges. In the same con-

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nection there was evidence tending to show that the scaling and making returns was part of the running expenses of the mill, and that the business of the scaler was to dog the logs, haul them in, scale them, and make returns to the boom company. After this and some further testimony, plaintiffs in error again offered the scaler's reports, and they were again excluded on objection.

This rejected evidence was not strong, and was open to an interpretation by the jury which would leave it without any force whatever. At the same time, it was susceptible in its nature, and under the actual circumstances, of a construction and application to help somewhat the side of the case occupied by plaintiffs in error, and we cannot assume the jury would have given it one construction or application rather than another. It was susceptible of a tendency or bearing in some degree to show that Worden had notice, or was aware that the mill business was carried on on Brigg's individual account, and not by or on account of the former firm; and according to one construction of it, it had some tendency to corroborate the testimony of Briggs and Robinson, and detract from the credit of that given by Worden. It may be that the mill bore the name "A. W. Briggs," and that the reports had been made out in the same way when Robinson was confessedly a partner, and before Worden began to run the mill; but all this would be for the jury to settle, and not for the court on an offer of proof. No satisfactory reason is perceived to justify the refusal to receive and submit the evidence to the jury for their construction and use, and in view of the peculiarities of the case it is quite impossible to say as matter of law that its rejection was not prejudicial. As the record is constituted, it is not prudent to discuss the other points, and it is more than probable the facts will not appear again as now. For the error mentioned, the judgment should be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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Isaac Haynes v. William B. Ledyard.

Agreement to work land for another's benefit: Chattel mortgages. An agreement whereby one party is to work land for the benefit of another who is to own and have the crops raised and apply the proceeds upon an indebtedness due to him from such other party, is not a chattel mortgage, and does not require to be filed with the town clerk to preserve the rights of the parties under it.

Fraudulent transfers: Pre-existing creditors: Intent: Evidence. As between one holding such a contract and the sheriff, claiming to hold the crops raised, as the property of the other party thereto, by virtue of an execution levy under a judgment rendered before the contract was made, it is competent for the sheriff to show that such contract was made to protect the property for such judgment debtor, and without any honest intent that it should have effect according to its apparent purpose; and the intent with which the instrument was made was a question of fact for the jury.

Evidence: Cross-examination. The cross-examination of a witness cannot properly be confined strictly to the precise subjects called to his attention in his direct examination, but should be allowed to extend to any matter not foreign to the subject matter of such examination, and tending to limit, explain or modify the same.

Heard January 12. Decided January 21.

Error to Kent Circuit.

This was an action of replevin brought by defendant in error against Haynes, who as sheriff had levied upon the property in question as that of Levi L. Phillips.

Norris & Uhl, for plaintiff in error.

Hughes, O'Brien & Smiley, for defendant in error.

COOLEY, CH. J:

We think the circuit judge was entirely right in the view he seems to have taken of the legal effect of the contract*

*The contract referred to reads as follows:

"This agreement made and entered into by and between William B. Ledyard, of the city of Grand Rapids, Michigan, of the first part, and John W. and Levi L. Phillips of the second part, witnesseth as follows:

"WHEREAS, The said Ledyard holds a real estate mortgage upon certain lands and premises, situate and being in the county

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between defendant in error and J. W. and L. L. Phillips. Such a contract, if made in good faith, is perfectly legal, and requires no filing with the town clerk to preserve the rights of parties under it. It is not a chattel mortgage, but an agreement under which land was to be worked for the benefit of defendant in error, the crops to be his.

But we also think the plaintiff in error was entitled to show that this agreement was made to protect the property for Levi Phillips, and without any honest intent that it should have effect according to its apparent purpose. Defendant justified under a judgment rendered before the agreement was made, and was therefore in position to assail its *bona fides*. If its real intent was merely to protect for Levi Phillips the fruits of his labor against pre-existing creditors, it was fraudulent as to them; and this intent was a question of fact for the jury.

An inspection of the record shows also that the judge

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of Kent, town of Plainfield, state of Michigan, and now occupied as a farm by said J. W. and L. Phillips; And whereas, said Ledyard also holds a certain chattel mortgage given by said Phillips, upon certain personal property belonging to said Phillips, said mortgage being dated about November 1st, 1872, and given for the sum of about six thousand nine hundred dollars; And whereas, said Phillips are raising crops on said farm, now have some harvesting, others nearly ready for harvest, and other crops sowed, and propose to put in more, with the consent of said Ledyard, for the years 1873 and 1874;

"Now therefore, in consideration of the premises, the said John W. and Levi L. Phillips hereby sell, assign, transfer and set over unto said Ledyard all said crops now harvested or growing, or to be raised hereafter, and the entire avails of said farm, and the stock thereon, and the increase of said stock, reserving enough thereof to pay the expenses of raising and harvesting the same, feeding the stock thereon, and conducting and carrying on said farm generally; and said Ledyard in consideration thereof hereby agrees to apply the proceeds thereof upon said mortgages as follows: First, the sum of fifteen hundred dollars upon said chattel mortgage, and after that, upon one or the other of said mortgages, as said Ledyard may think proper and best to make good and safe his security.

"In witness whereof the said parties have hereunto set their hands this fourteenth day of July, eighteen hundred and seventy-three.

"(Signed) JOHN W. PHILLIPS,
L. L. PHILLIPS,
W. B. LEDYARD."

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applied a rule of cross-examination not consistent with previous decisions of this court. We refer here particularly to what was said in *Chandler v. Allison, 10 Mich., 460; Thompson v. Richards, 14 Mich., 172; Detroit & Milwaukee R. R. Co. v. Van Steinburg, 17 Mich., 99,* all of which, and many others, are inconsistent with the ruling of the court on some questions. The question put to Levi Phillips as to the person who paid for the purchase of the Walker interest may be taken as an illustration. This was not foreign to the subject matter of the testimony given by the same witness in chief; and the benefits of cross-examination may be, and must be almost nullified if such questions must be rejected because that precise subject was not called to the attention of the witness by the party who called him. It cannot be necessary to repeat what we have previously said on this subject, as this case, we think, is clearly within the prior rulings.

The judgment should be reversed, with costs, and a new trial ordered.

The other Justices concurred.

George K. Newcombe v. Alonzo Chesebrough.

Swamp-land road contracts: Reservation: Statute construed. It is against the policy of the law to permit the question whether specific lands are reserved or not under the statute (*Comp. L. 1871, § 3959*) providing for the reservation of lands selected by state road contractors, to be left open to private arrangement or to parol evidence.

State roads: Board of control: Extension of contracts: Time specified. The board of control, however, are given by the statute broad powers for extending the time for completing any contract, and as the statute expressly provides for the reservation of lands selected by such contractors to apply on their contracts "during the full time specified in said contract for the completion thereof," any extension lawfully authorized by the board would become the "time specified," and the reserve would continue during that period.

State roads: Contracts: Time specified. But the time "specified in the contract" cannot be made to include any period not within the original contract or some authorized extension.

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NEWCOMBE v. CHESEBROUGH.

Boards: Joint action: Votes: Creating a term: Affirmative action. The action of a board of several persons must be determined by their votes, as evidenced by their record; their action separately amounts to nothing; and their joint action must be evidenced in some way as the action of a lawful majority; and it requires affirmative action to create a term of "time specified."

Swamp-land road contract: Reservation: Renewal: Vested rights. During any interval that may elapse between the expiration of the original time specified in the contract and any subsequent renewal or extension thereof, there would exist no valid reservation in favor of the contractor; and where during such interval the lands have been lawfully patented to others, the board of control cannot, by afterwards renewing the contract, take away the rights thus vested in such patentees, although such renewal would bind the state to pay for the work.

Heard January 12 and 13. Decided January 21.

Appeal in Chancery from Iosco Circuit.

Gaylord & Hanchett and *Ashley Pond*, for complainant.

W. Scofield, E. W. Meddaugh and *T. Romeyn*, for defendant.

CAMPBELL, J:

The bill in this case is filed to obtain from Chesebrough certain lands patented to him on the 11th of January, 1868, at which time complainant claims they were legally held for his benefit under a reservation upon a swamp-land road contract, and therefore not subject to private entry.

The contract, or contracts (for there were five of them), were made by the state authorities with one William Thorlby on the 6th of April, 1863, to build one mile under each contract of the Midland and Isabella state road. The work was to be done by November 4, 1864. Within that time it was accepted by the local commissioner, prior to October 4, 1864, when Thorlby died. On the 1st of October, 1864, the contracts were assigned to Frederick P. Shaw. The governor for a long time delayed acting upon the certificates of completion, but in August, 1865, David Crapo was directed by the governor to examine the road throughout, and reported it incomplete. Milton Bradley, local commissioner, subsequently examined it, and reported adversely.

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On the 21st of August, 1867, Newcombe obtained an assignment of these contracts, and applied to the commissioner of the land office for a list of the lands reserved, which the commissioner sent him. He then proceeded, under assurances of the local commissioner, to do the work and bring it to completion. On the first of April, 1868, the board of control passed a resolution declaring that all contracts which "by their terms" expired on or before December 31, 1867, should be canceled by the 1st of July, 1868, unless evidence should be furnished of their being performed properly, and directed notice to be given to contractors. Newcombe did not receive notice till July 2, when upon his representation the order was suspended, and the work was finally approved December 31, 1868.

On the 15th of January, 1869, on applying for patents, complainant learned the lands had been sold.

The main question in this case is, whether the reservation remained in force when this sale took place. The statute declares that lands selected by contractors to apply on their contracts shall be "withheld from market *during the full time specified in said contract for the completion thereof.*"—*Sec. 5 of road law; § 3959 C. L.*

It also provides that the board of control may extend the time for completing any contract.—*Sec. 3 (§ 3957).* In this their powers are very large, and whatever they did concerning these contracts, we are disposed, as now advised, to assume was lawfully done, and binding on the state.

The question is, whether the reservation was kept alive all this time by what was done.

No action was taken by the board, one way or the other, until after defendant purchased the lands. But there is evidence which seems to show that contracts while running uncanceled were regarded by them practically as in force. There is no official resolution to that effect.

When lands have once become subject to sale they may be reserved from sale in various cases, of which the contract reservations in question furnish a common instance.

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But it is evidently the policy of the law that the question whether they are reserved or not shall not be left open to private arrangement or to parol evidence. Such a course would be open to frauds. This statute declares the reservation to last during the time "specified in the contract." This is very clear language, and must have been adopted for some purpose. That purpose is evident. It was to enable all persons to have means of definitely knowing whether the lands were in market, and probably, also, as a means of hastening tardy contractors.

But we think that whenever the board of control saw fit to extend a contract, the extension became the time specified, and the reserve would exist during that period. But as the board was the only body authorized to extend the contract, we cannot find any support for the claim that the time "specified in the contract" can include any period not within the original contract or some authorized extension.

It is well settled that the action of a board of several members must be determined by their votes, and the votes must be looked for in their record. Their action separately can amount to nothing, and their joint action, whether meeting or not meeting (supposing they can act by consent expressed by writing, upon which no opinion need be given), must be evidenced in some way as the action of a lawful majority. It must be affirmative action, or it cannot create a term of time "specified."

In the present case there was an interval of some years between the end of the time specified in the original contracts and any action of the board. During that interval we are compelled to hold there was no reservation, or else to completely disregard the only statutory conditions on which reservations were allowed to be made. The rights of defendant were obtained when the reservation was not in existence. The board of control could not, by subsequent action renewing the contract, take away his vested rights, although such renewal would bind the state to pay for the work. But contractors were not bound to file reservations unless they

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chose, and the loss of these lands does not deprive complainant necessarily of his remuneration out of others. The loss of these arises from a breach of the Thorlby contracts, and the extension was never obligatory on the board, but they could grant it or not, in their discretion.

Under these circumstances, complainant has no ground for relief. The decree must be reversed, and the bill dismissed, with costs of both courts.

The other Justices concurred.

Andrew Baxter v. John Spencer.

Chattel mortgages: Extension: Unlawful seizure: Payment. Where a chattel mortgagee has made a distinct arrangement with a subsequent purchaser of the property who has assumed the payment of the mortgage, extending the time of payment four days to a day named, and appointing a specified place of payment, he is not justifiable in seizing the property without cause before the designated day; and payment at the appointed place on the day named will operate as a satisfaction of the mortgage.

Submitted on briefs January 18. Decided January 21.

Error to Hillsdale Circuit.

George A. Knickerbocker, for plaintiff in error.

E. L. & M. B. Koon, for defendant in error.

GRAVES, J:

Baxter owned a yoke of oxen in 1874 subject to a mortgage made by one Holmes to Spencer. The mortgage was in common form to secure sixty dollars and fifty cents, November thirtieth, 1874, with interest at ten per cent. No place of payment was expressed. Baxter was in possession, and before the mortgage fell due Spencer called on

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Baxter to take possession on it. Thereupon Baxter gave to Spencer in writing on a copy of the mortgage in Spencer's hands, his promise of guaranty of payment of the mortgage, and that he would pay him two dollars for his trouble, and hold the cattle until payment. Spencer thereupon allowed them to remain in Baxter's possession. This occurred on the sixth of July, 1874, or about five months before the mortgage was to fall due. On the third of December, and whilst the cattle were in Baxter's possession, and at a place some distance from his residence, Spencer seized and drove them away without Baxter's knowledge or consent. Baxter then brought replevin; but under the charge by the court Spencer recovered. On the trial the foregoing facts appeared. There was also evidence tending to prove that when Baxter made his undertaking in July he offered payment, and Spencer refused it on the ground that the money was not due and he preferred it should stand on interest; that it was then mutually agreed that payment should be made at Palmer's store in Camden, and that the copy of mortgage having his guaranty of payment should be left at the store two or three days before maturity, to consummate satisfaction; that two or three days previous to the thirtieth of November Baxter called at Palmer's store for the mortgage in question, and it appeared that it had not been left; that on the thirtieth of November Spencer went to Palmer's store and inquired if Baxter had left any money there to pay the mortgage, and was informed by Palmer that Baxter had been there two or three days before, and had asked if the mortgage had been left there for him to pay, and had been told by him, Palmer, that it was not there, and had not been brought there; that Spencer then procured Palmer to write Baxter that he, Spencer, would be at the store on the ensuing Friday, December fourth, for the money or the oxen; that Baxter received the letter on Wednesday, and in accordance therewith called at Palmer's store on the morning of Friday the fourth of December, and paid in and left the money to satisfy the

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mortgage, where it has since remained for that purpose; that Spencer, without having suggested any other time or place of payment, or any change of purpose, or any intent to seize the cattle before Friday, actually seized and drove them away, as before stated, on the day previous.

The court, among other things, charged that if Baxter did not have the money at Palmer's store until Friday, December fourth, and Spencer took the cattle on the third, the taking was lawful, and Baxter not entitled to recover. We think the court erred.

The evidence conduced to show, not only a waiver of all right to take advantage of non-payment on the thirtieth, but also a distinct appointment by Spencer of Palmer's store as the place, and the fourth of December as the time of payment, and it was entirely competent to make the arrangement.—*Franchot v. Leach, 5 Cow., 506; Robinson v. Batchelder, 4 N. H., 40; Manning v. Burges, 1 Chy. Cases, 29.*

And there was no evidence that Spencer had reasonable cause for thinking on Thursday that his security would be endangered by deferring seizure until the next day, and which he had himself set for payment. Besides, the evidence was strong to create an inference that his declarations and conduct were meant to mislead Baxter and afford a pretext for seizing the property.—*Borden v. Borden, 5 Mass., 67; Frazier v. Cushman, 12 Mass., 277; Gilmore v. Holt, 4 Pick., 258.* If the evidence referred to was satisfactory to the jury, Spencer had no right to take the property on Thursday, and in taking it he was a wrong doer, and the payment at Palmer's the next day, in accordance with his own request, was a satisfaction.

The judgment should be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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Benjamin F. Bradley v. Henry Silsbee.

Evidence: Proof of documents: Record: State patents: Instruments belonging in private hands. The general rule in regard to proof of documents is, that the original shall be produced unless required to remain in some public office; and no record of an instrument belonging in private hands can be given in proof as primary evidence except by virtue of statutory provisions; and the reception as such evidence, in the absence of any statute authorizing it, of a certified copy of a record in the office of the secretary of state, of a state patent, is error.

Heard January 13. Decided January 21.

Error to Midland Circuit.

Gaylord & Hanchett, for plaintiff in error, on the point that the certified copy of the record in the office of the secretary of state was not admissible to prove the patent, cited: *Smith v. Lawrence, 12 Mich., 431; Haile v. Palmer, 5 Mo., 417; Brown v. Hicks, 1 Ark., 232; Peck v. Clark, 18 Texas, 240; Hatchett v. Conners, 30 Ib., 110; Filler v. Shotwell, 7 W. & S., 14; Harker v. Gustin, 7 Halst., 42; Hammalt v. Emerson, 27 Me., 334.*

H. H. Hoyt, for defendant in error, to the same point *contra,* cited: *Clark v. Hall, 19 Mich., 371.*

CAMPBELL, J:

Defendant in error brought ejectment, and to maintain his title introduced in evidence a paper purporting to be a certified copy of a record in the office of the secretary of state of the state of Michigan, of a patent from said state to one Delway Jones, dated March 25, 1869. The certificate of the secretary of state, under the great seal, certified it to be a true transcript of the whole of the original record of patent No. 19,950 in his office.

Objection was made that there is no law providing for the recording of patents in that office, and that no founda-

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tion was laid for secondary evidence. The testimony was admitted, and error is assigned upon it.

As the secretary of state is required to act with the governor in fixing the seal of state to all patents, and is only to issue them in proper cases and upon proper vouchers, he is obliged to keep some kind of record which will show what patents issue, and all the means of identifying them. He is required to record at length all titles of lands belonging to the state, in whatever form they are made.—*C. L.* §§ *211 to 216*. There is, however, no statute which requires him to make *verbatim* records of patents issued, so far as we have discovered.

In regard to internal improvement lands, which are paid for in full, the governor is required to execute and deposit with the secretary of state patents for all parcels reported to him as sold and paid for, "which patents, or duly certified copies thereof, shall be sufficient evidence of the facts contained therein."—*C. L.*, § *3859*. These patents are not to be issued by the secretary until the proper certificates and vouchers are filed.—§§ *3860–1*.

Where swamp lands have been earned, the governor is in like manner to execute patents and file them, not with the secretary of state, but with the commissioner of the land office, to be delivered if called for, and otherwise to be filed, and notice given to the county treasurers that they may be taxed.—*C. L.*, §§ *3996–7–8*.

Nothing is said in either of these laws concerning recording patents, or making copies of the record evidence. There may be cases where persons not entitled to call for the originals may have occasion to prove the contents of such papers on file, and if so, the statutes provide how any papers in a public office may be exemplified, and the patents on file would be like other documents in the same position, originals, and not recorded copies. By *section 3869* provision is made for recording patents by the various registers of deeds, whereby the record is to have the same effect as that of other conveyances.

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There are, under the common law, and perhaps under some of the laws of the United States, some public acts of record, where the original is always found in the public office, and the copy issued to the party interested is itself an exemplification. Our statutes do not go upon this theory. The patent is signed by the governor and verified by the secretary of state as his certifying officer, and the original is delivered to the grantee in all cases. It may be recorded in the county records, and evidence of its contents thus preserved. Copies from a county record of all deeds are *prima facie* evidence.—*C. L.*, § *4233*.

The general rule in regard to proof of documents is, that the original shall be produced unless required to remain in some public office. If it belongs in such a place it can be proved by an exemplification. If belonging in private hands it must be introduced in evidence, unless lost or otherwise beyond the power of parties to prove it except by secondary evidence. Our statutes are peculiar in allowing the record of deeds to be given in proof as primary evidence. No record of deeds can have such an effect except by statute, and such statutes are uncommon.

If the secretary of state keeps accurate copies of all the patents which he issues, it may be a very useful precaution, and furnish valuable means of procuring secondary evidence; but there is no statute making such records, or transcripts from them, primary evidence.

As this was the only proof of title offered by the plaintiff below, he made out no case.

The questions presented concerning the title of the defendant below are important, but as we understand they are likely to be presented in other cases, where it may be easier to dispose of them without being involved in some of the minor disputes disclosed by this record, we shall not now discuss them.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

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Robert Caswell and another v. Chauncey Gibbs.

General contracts in restraint of trade: Construction: Limitation. While there are cases where a contract in restraint of trade, general in its terms as to the place or extent of territory over which it should extend, may, in the light of all the surrounding circumstances, be so construed that effect can be given to it, yet it is not always easy or safe to thus construe and then enforce such a contract; especially where there is no certainty that the contract as thus construed and limited was the one the parties had in mind and intended to provide for in their agreement.

Equity jurisprudence: Injunction: Uncertainty: Indefiniteness. An agreement to "never tow vessels in competition" with complainants, or either of them, is too uncertain and indefinite to be enforced by injunction, since every case of alleged violation would involve the consideration of the questions of fact, depending on the peculiar circumstances of each case, whether there was in fact any competition, whether complainants at the time were furnishing sufficient facilities, and what ought to be considered sufficient facilities.

Heard January 14. Decided January 21.

Appeal in Chancery from Mason Circuit.

H. H. Wheeler and *C. G. Wing*, for complainants.

White & Haight, for defendant.

MARSTON, J:

We do not deem it necessary to discuss the various questions raised in this case, as we are in the outset met with some serious difficulties in the way of granting the relief prayed for.

The bill was filed to restrain defendant from violating the following contract:

"Whereas Caswell and Breinig have heretofore released Gibbs and Maxim from a contract for towing and delivering logs, now, in consideration thereof, I, Chauncey Gibbs, do hereby agree that I will never tow vessels in competition with said Caswell and Breinig, or either of them.

"Dated at Ludington, Michigan, this 19th day of May, 1873.

"(Signed) CHAUNCEY GIBBS.

"I agree to same as above.

"(Signed) A. A. MAXIM."

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This agreement is not set forth in full in the bill of complaint, but is there treated and referred to as an agreement that the said Gibbs and Maxim, "each contracting for himself separately, would never tow vessels in competition with your orators, to-wit: at the port of Ludington."

It is thus apparent that counsel recognized the necessity of restricting and limiting the agreement in respect to the place at which such towing was not to be done. There is no such limitation in the agreement, nor is there any thing in it from which such a limitation could be inferred. While there may be, and undoubtedly are cases where a contract general in its terms as to the place or extent of territory over which it should extend, as in *Hubbard v. Miller, 27 Mich., 15*, may, in the light of all the surrounding circumstances, be so construed that effect can be given to it, yet it is not always easy or safe to thus construe and then enforce it. Many cases must arise, and we think this one of them, where there would be no certainty that the contract as thus construed and limited was the one which the parties had in mind and intended to provide for in their agreement. But without disposing of the case upon this point, and admitting for the present that it might be so restricted, there are still other serious difficulties to be encountered in the way of enforcing such an agreement.

This is not an agreement on the part of defendant Gibbs that he will not thereafter tow vessels at Ludington while complainants are engaged in that business, but it is that he will not tow vessels in *competition* with complainants, that is, that he will not seek or endeavor to obtain the right to tow any vessel or vessels which complainants are endeavoring to obtain. It is the action of seeking the same object which constitutes the competition. Take the case of a vessel where complainants for some reason were unable to tow her, or where a third party, and not complainants, were endeavoring to do the work; defendant might here step in and do the work or compete with such third party for the contract or right to tow the vessel, without any violation of the agreement in this case. So that should

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we attempt to enforce this agreement by restraining and enjoining defendant from competing with complainants in the business of towing vessels at Ludington and in that vicinity, the question must still arise in every instance where it is alleged that defendant has violated his agreement or the decree of the court, whether the defendant did in such case really obtain that which, had he not interfered, the complainants would have obtained. The bill of complaint as framed recognizes this difficulty, and prays that defendant "may be enjoined and restrained from towing vessels at said port of Ludington, Mason county, Michigan, in competition with your orators, and from towing vessels into or out of said port of Ludington, while your orators are engaged in the same business of towing vessels into or out of said port of Ludington, and *while your orators furnish sufficient facilities for, and faithfully perform, or offer to perform, all such towing business at said port.*"

The question, therefore, not only as to whether there was in fact any competition, but also whether complainants at the time were furnishing "sufficient facilities," and what would be considered "sufficient facilities," must arise in every case of an alleged violation.

The difficulties in the way of enforcing an agreement of this uncertain and indefinite character were so fully discussed in *Blanchard v. Detroit, Lansing & Lake Michigan R. R. Co., 31 Mich., 43*, that a bare reference to that case is sufficient to dispose of this one. It would be difficult to add any thing to the reasons there presented, which must be considered conclusive in this case. I am of opinion that the decree of the court below dismissing the bill should be affirmed, except that it should be so modified as to be without prejudice, complainants to recover costs of both courts.

The other Justices concurred.

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Peter P. Van Vleet v. Robert Blackwood.

Mortgages: Assignment: Recital of prior assignment: Admissions. An assignment of a mortgage which recites a prior assignment by the same person to another is of no avail to prove title in the assignee named therein, as it is an admission that the assignor had no title to assign.

Recitals: Title: Admissions: Evidence. The further recital, that the prior assignment was made to one under whom the present assignee claimed, is no evidence of that fact; while one may admit title out of himself, he cannot admit title into any other.

Submitted on briefs January 14. Decided January 21.

Error to Lenawee Circuit.

This was ejectment brought by Blackwood, who claimed title by virtue of a mortgage dated May 27, 1837, given by one Miller, then owner of the land, to one Adee.

Stacy & Underwood, for plaintiff in error.

Walker & Weaver, for defendant in error.

PER CURIAM:

This case will be reversed on the ground that the plaintiff below showed no title to the mortgage. He claimed under an assignment from Adee which recited a previous assignment to another person; which, in other words, admitted that the assignor had no title to assign. True, it says the prior assignment was made to Samuel Blackwood under whom the plaintiff claimed; but this was no evidence of that fact. Adee could admit title out of himself, but he could not admit title into any other.

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The People on the relation of the Village of Decatur v. The Township Board of Decatur.

Mandamus: Liquor tax: Villages: Townships. The right of villages to the liquor tax collected within their borders is sustained; and such a tax belonging to a village having been assessed and collected by the township officers and used for township purposes, *mandamus* is granted to require it to be paid over to the village authorities.

Mandamus: Disputed claim: Admitted facts: The question involved being purely one of law, and there being no disputed questions of fact, the claim is in no proper sense a disputed claim, requiring a formal trial; and it would be idle to send such a case to a jury when it would be the duty of the court to instruct the jury to return a verdict for the relator.

Heard January 18. Decided January 21.

Application for *Mandamus.*

This is an application to require respondents to pay over certain moneys collected in the village under the liquor tax law. The assessment was made by the township instead of the village authorities, and the taxes have been paid over to the township by the parties assessed.

Newton Foster, for the relator.

H. F. Severens, for respondents.

COOLEY, CH. J:

We assent fully to the principles laid down by counsel for the respondents regarding the writ of *mandamus,* and the cases to which, in general, it is applicable. But we have not been able to concur in their application to the present case.

In our view, the right of the relator to the tax in question is clear. It is not disputed that the village assessor might, and should, have made the assessment, and that if he had done so, the tax should have been collected for, and paid over to the village. But his failure to do so can work

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no estoppel against the village, in favor of the township. The township has in no way changed its position in consequence, except as it has received this money; and the mere receipt of money by a party not entitled can of itself create no equity in his favor. The township assessor, in making an assessment he had no right to make, was not the agent of the township, and not entitled to compensation from it.

The controversy here appears to us to be simple. The village had a right to assess certain taxes, which should then be collected for its use. The township officer has assessed them without authority. The parties assessed have paid over, though probably under no obligation to do so, and the township has had and used the money. It is possible that the village assessor might have disregarded what was done, and made a lawful assessment himself, but it is manifestly wiser and more proper that the village should sanction the collection and claim the money, instead of exciting litigation by new proceedings. There are no disputed questions of fact in the case, and therefore the claim is in no proper sense a disputed claim, requiring a formal trial. The question involved is purely one of law, and the township disputes the demand only as any party in any case may dispute the right of another which depends on questions of law. It would be worse than idle to send such a case to a jury, when, if sent, it would be the duty of the court to instruct the jury to return a particular verdict.

The fact that the township has used the moneys will excuse from present payment in money, but the relator is entitled to a township order, and the writ should issue as prayed.

The other Justices concurred.

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Charles T. Bradley v. Mark S. Tyson and others.

Trustees: Mortgages: Foreclosure: Purchase: Beneficiaries. A trustee in whose name a mortgage was taken to secure the payment of separate claims of several creditors of the mortgagor is held not to have authority to bind objecting creditors by a purchase on the foreclosure of the entire property for the joint benefit of all; neither could a majority of the creditors coerce the others into any arrangement for buying the lands at the foreclosure sale.

Trustee: Good faith: Practice: Re-sale. The trustee having in good faith made the purchase, not on his own behalf, but in pursuance of what he seems to have deemed to be his duty to his *cestuis que trust*, a conditional order is granted for a re-sale at the option of those creditors objecting to the purchase as one made on their behalf.

Heard January 18 and 19. Decided January 21.

Appeal in Chancery from Manistee Circuit.

This was a foreclosure bill. The mortgage was given by the members of the firm of Tyson, Sweet & Co., to complainant, as trustee, to secure the payment of several creditors of said firm. Decree *pro confesso* was rendered. The sale was made in two parcels, and the property struck off and deeds made to complainant as trustee, one parcel at $70,000 and the other at $90,000. One Ramsdell was the only competing bidder, and his highest bids were $65,000 on the first parcel and $85,000 on the other. On the coming in of the report of sale the sale was confirmed, against the objection of some of the creditors, as one made to complainant as trustee on behalf of all the creditors. From this order the objecting creditors appealed.

Dovel & Morris and *Finches, Lynde & Miller*, for complainant.

Ramsdell & Benedict and *Mariner, Smith & Ordway*, for defendants.

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COOLEY, CH. J:

The importance to the parties of an early decision of this case, in view of the conclusions at which we have arrived, induces us to dispose of it now, instead of taking time for any elaborate discussion of the positions which were taken by the respective counsel on the hearing.

We are entirely satisfied that the trust mortgage did not contemplate an authority in Bradley to buy in the mortgaged property for the *cestuis que trust*, and to hold the same to be managed and disposed of by himself as their trustee. The possibility that it might become necessary for some person or persons to bid in the property to prevent sacrifices, we may fairly suppose the parties did contemplate, but the contingency was one for each creditor to make provision for as his own interest might seem to dictate, and not for the trustee to look out for. The creditors entered into no joint arrangements whatever beyond selecting a person who, without having possession or control of their claims, was to take, hold, and if need be enforce, a security for the protection of all severally. Undoubtedly the arrangement empowered him to take legal proceedings for foreclosure, but there, we think, his authority terminated. It was for the creditors to see that the property was not sacrificed, and not for him.

We are also satisfied that a majority of the creditors could not coerce the others into any arrangement for buying the lands at the foreclosure sale. None of them, in consenting to the security, has surrendered any right of individual action, and each is at liberty to consult his individual interest. It might well happen that the interests would not be the same. A man with an endorsed note might peril his security by an arrangement which would be perfectly safe to the others. We do not examine any questions affecting single parties, because we are clear that neither a majority of the *cestuis que*

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trust nor the trustee was intended to be clothed with the power which has been attempted to be exercised.

It follows from these views that the order of confirmation was incorrect, so far as it undertakes to bind non-assenting parties to a participation in the trustee's purchase. The question then recurs, what relief shall be given?

We think it would be unjust to the trustee that he should be compelled to take the land and account to the appellants for their proportion of his bid. We see no reason to doubt the good faith of the trustee's action in making the purchase. But he did not buy for himself, and if he has erred in supposing that it was competent for him to bid for all the parties secured, he ought not to be made to suffer for the error. Justice would require that if the appellants insist upon their objections, the sale should be opened.

With these views we are disposed to make a conditional order. If the appellants, with the decision that they cannot compel the trustee to take the land, shall see fit to file their assent to the purchase made by the trustee as one on behalf of all, they will be at liberty to do so within twenty days from this day, and on filing such assent and serving notice thereof on complainant's solicitor, an order may be entered that the sale as made to Bradley as trustee do stand confirmed. If they shall fail to file such assent, the trustee shall be at liberty, within twenty days after the expiration of said twenty days, to elect either to take the land for the other creditors, paying to the appellants their proportionate share, or to have the sale opened; and in such case, on serving notice of the election, an order shall be entered accordingly, giving the trustee sixty days thereafter to make payment, with interest from the day of election. But the share to which the appellants should then be entitled should be their proportion of the Ramsdell bid, which they insisted the trustee should accept, and not of the bid made by him. If neither party shall file an election within the time provided, the sale shall stand set aside, and the trustee should proceed to make sale anew.

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The appellants will recover costs of this court, and the case will be remitted for proceedings in accordance with these views.

The other Justices concurred.

Alexander Roethke v. The Philip Best Brewing Company.

Contracts: Place: Sales: Liquors: Prohibitory liquor law. A contract made in another state for the sale of liquors to be delivered in Michigan, such as would be valid at common law, and which is not shown to be invalid where made, cannot be held void by virtue of the prohibitory liquor law of Michigan.

Prohibitory liquor-law: Money paid for unlawful purchases: Set-off: Money had and received. A claim for money paid for unlawful purchases of liquors sold in violation of the prohibitory liquor law, may be set off against any lawful demands sued by the vendors. The statute providing that money so paid shall be deemed to have been received without consideration, and may be recovered back, the liability for the same is thereby put on the same footing as for any other money had and received.

Recoupment: Notice: Indefiniteness. A notice of recoupment averring damages for breach of plaintiff's contract which does not point out in what respect the contract had been broken to defendant's injury, is held too indefinite to allege errors upon.

Heard January 19. Decided January 21.

Error to Saginaw Circuit.

Albert Trask, for plaintiff in error.

William H. Sweet, for defendant in error.

CAMPBELL, J:

Roethke was sued for beer furnished by defendants in error, who were a corporation located in Milwaukee. The beer was sold after verbal negotiations with an agent, carried on at Roethke's store in Saginaw City. The jury

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having found the transactions were sale, and not agency, several questions otherwise material cease to be so.

Part of the beer was sent under the Saginaw city negotiations, and the sale was held by the court below to have been void under the Michigan liquor law. The remainder was sent from Milwaukee on separate orders, and held by the court to be valid foreign contracts. As the verbal agreement made in this state was not sufficient under the statute of frauds to cover future orders, and as those, therefore, stood on their own merits, and the sales and shipments were in Milwaukee, the rulings on these were correct, as there was a contract made there which would have been valid at common law, and which we must presume valid, under which those latter sales were made.

But the court refused to allow the money paid for the unlawful purchases to be set off against the demand in suit for the rest.

This was a manifest error. The statute declared that all moneys paid for liquors sold in violation of law should be considered "as having been received without consideration," and recoverable back by the person paying the same, etc.—*C. L.*, § *2137*. This law places the liability for such money on the same footing as for any other money had and received. It was therefore as legitimate ground of set-off as if plaintiffs below had collected it for defendant and failed to pay it over.

There is a notice of recoupment attached to the plea, averring damages for breach of the plaintiff's contract to supply defendant with all the beer he could sell, and that it should be good and salable. As it does not point out in what respect the contract had been broken to defendant's injury, it is too indefinite to allege error upon, and we do not deem it important to consider the minor questions raised in reliance on it.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

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David Carver v. Thomas W. Palmer and another.

Landlord and tenant; Occupancy by arrangement with tenant. One who merely makes an arrangement to, and does occupy jointly with another who has been left in possession of premises originally taken by virtue of a lease to him and another, does not thereby, in the absence of any dealing with the original lessor, become tenant to such lessor.

Agreement for joint occupancy: Contract construed: Rent: Use and occupation: Assignment. S, in possession of a store by virtue of a lease to himself and another, made an agreement with C, to permit C to occupy the store jointly with S, in consideration of C's furnishing and keeping up a stock of goods to belong exclusively to C, which both were to manufacture and sell, and paying to S as compensation for his services half the net profits:—

Held, That this agreement did not obligate C to pay rent except inferentially as a part of a joint occupancy and as expenses of business; that the remedy for a breach on C's part was an action for damages, and not one for use and occupation; that it made no promise to pay rent to S; and that S could not assign any claim under it for rent or for use and occupation, or for any thing not distinct and severable.

Submitted on briefs January 19. Decided January 21.

Error to Wayne Circuit.

Ward & Palmer, for plaintiff in error.

F. H. Canfield, for defendants in error.

CAMPBELL, J:

This action was originally brought in a justice's court, and appealed to the Wayne circuit. The declaration claimed a recovery for use and occupation of a store for the months of October, November and December, 1874. The declaration was oral, and claimed in one count that the premises belonged to plaintiffs below, and in the other, that the rent was due from defendant below to William S. Shaw, and assigned by Shaw to plaintiffs.

The claim which Shaw assigned to plaintiffs was, "all claim and demand which I may have against David Carver, for or on account of the rent of the premises within mentioned, and all claim and demand which I may have against said Carver,

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for or on account of his occupancy of said premises under the written agreement." That written agreement was dated August 1, 1873, between Carver and Shaw, and was in substance as follows: *First*, Shaw agreed to permit Carver "to occupy jointly with him" the store in question, and to put into it a sufficient stock of clothing and tailor's goods, etc., for the proper carrying on of said business, the occupancy to last two years and nine months, and the stock, etc., to belong exclusively to Carver; *second*, Shaw was to assist Carver in sales and manufacture of the stock into garments; *third*, Carver agrees to keep up a stock of $3,000; *fourth*, Carver agrees to pay Shaw as compensation for his services half the net profits; *fifth*, the agreement was subject to termination by mutual consent, on three months' notice.

The same business had been carried on, under substantially similar agreements (except as to amount of compensation), since April, 1872.

The premises had been leased by the grantor of plaintiffs to Shaw and Burghardt, from May, 1871, for five years, by lease not assignable without consent in writing, and never assigned. Burghardt left Shaw in possession in 1871.

Shaw took receipts for rent in Burghardt & Shaw's name, and Carver paid rent up to November, 1874, and took receipts in the same way. He refused to pay for the months of November and December, and left in January, 1875.

Without referring to any other facts, this testimony is all that tended to show any liability in Carver to pay rent to any one.

There is no evidence tending to show that Carver was treated by plaintiffs below, or ever dealt with them except under the Burghardt & Shaw lease. Under that he did not become their tenant. The only obligation he was under to Shaw was by reason of the written agreement. If that bound him to pay rent it was only inferentially as a part of a joint occupancy and as expenses of business. If he failed to pay, it subjected him to a suit for breach of contract, but there was no promise to pay rent to Shaw, nor

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to pay it at all, if Shaw was in arrears to Carver to that amount. The remedy for such a breach of contract was an action for damages, and not one for use and occupation. Shaw could not assign any claim for use and occupation, and could not assign under this contract any thing which was not distinct and severable. He has made no assignment of any such claim.

There was no evidence to support a recovery, and the jury should have been so instructed. The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

Robert McQueen v. Henry Gamble.

Contract: Repudiation: Estoppel. A defendant is not at liberty, for the purpose of turning the plaintiff out of court, to set up and claim the benefit of a contract which he concedes he refused to regard and expressly repudiated.

Common counts: Work and labor: Special contract. Where plaintiff had performed for defendant services shown to be worth more than plaintiff had received for them, and for which no bargain was made as to price, except one which the defendant shortly after repudiated and refused to regard, it was held error to rule that no recovery could be had on the common counts, and that the action should have been brought on the contract.

Submitted on briefs January 19. Decided January 21.

Error to Saginaw Circuit.

Albert Trask, for plaintiff in error.

Wisner & Draper, for defendant in error.

GRAVES, J:

Plaintiff sued defendant before a justice, under the com-

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mon count for work and labor, to recover for services as book-keeper. He got judgment, and defendant appealed. The jury found against him in the circuit court, and he claims the judge erred in charging.

There was no dispute but that he served defendant as book-keeper, at defendant's request, between sometime in April, 1874, and the latter part of the August following, and neither was there any question but that plaintiff had received nearly, if not all, his pay for such services, if calculated at the rate of one thousand dollars per year, and the defendant claimed that it was agreed between them, about the close of the service, that the pay should be at that rate. The defendant claimed he was entitled to six dollars per day for a portion of the time, and five dollars for the rest. The arrangements as to pay were testified to by the parties, and the testimony they gave was contradictory.

That given by plaintiff tended to show that on the 26th of August he talked with defendant, and that it was then agreed that he should work for defendant for a year, including his four month's work performed prior to the 23d of August, at one thousand dollars for the year, and that in accordance with that understanding he entered a credit on defendant's books, and at his request, and that three days afterwards the defendant expressly repudiated this agreement and employed another person in plaintiff's place. The defendant's testimony went to show that the agreement was that plaintiff should receive pay for what he had done at the rate of one thousand dollars per year, and that there was no agreement to employ plaintiff for a year's time. Defendant's version of the arrangement between the parties varied greatly in other respects from that of plaintiff. The court charged the jury that if they believed the plaintiff, then the contract was for a year's hiring, including the four months, and in such case there could be no recovery; that the action should have been brought on the contract, and not on the common count. He further charged, in substance, that if the jury

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believed the defendant, then the plaintiff was not entitled to recover. The instruction was erroneous. There was evidence tending to show that the service was worth more than at the rate of one thousand dollars per year, and more than the plaintiff had received, and if, as the plaintiff's testimony tended to show, there was no bargain as to price except that made in August, and the defendant repudiated that, and refused to regard it, shortly after it was made, the plaintiff was entitled to recover. The defendant was not at liberty to claim the benefit of a contract he refused to regard and expressly repudiated, in order to turn the plaintiff out of court. If the jury believed the plaintiff's evidence he had a valid cause of action under the general count for work and labor.

The judgment should be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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APRIL TERM, 1876.

Mary A. McBride v. William J. Rea and others.

Chancery appeals: Testimony taken in open court: Settling case: Motion to dismiss: Practice. Motion by complainant and appellee to dismiss appeal for the reason that no case had been settled, the testimony having been taken in open court, is denied where the evidence having been taken by the stenographer, the court below has certified up, though after the expiration of the statutory period, what is stated in the certificate to be the whole evidence; but the certificate failing to state that a case had been settled, leave is granted to complainant, if not satisfied with the proofs as returned, to have the case resettled.

Heard and decided April 4.

Appeal in Chancery from Superior Court of Detroit.

The testimony having been taken in open court, no case was settled, as required, within the period prescribed by the statute. Subsequently, however, at request of defendants and appellants, the judge of the court below certified up a transcript of the minutes of the stenographer who had taken down the testimony, as the whole evidence in the cause, but the certificate failed to state or show that a case had been regularly settled.

Otto Kirchner, for complainant, moved to dismiss the appeal for the reason that no case had been settled as required by the statute where the testimony is taken in open court.

Charles C. Hickey, for defendants.

THE COURT denied the motion, but granted leave to complainant, if not satisfied with the proofs as returned, to have the case resettled.

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Milton Frost v. John Lawler.

Practice: Motion to strike from docket: Notice. Motion to strike from docket on ground that cause was noticed by counsel for defendant in error who had not caused an appearance to be entered in supreme court, will not be heard without notice, in the absence of counsel representing the other side.

Heard and decided April 4.

J. Henry Whittemore and another v. John P. Weiss.

Libel: Injury to business: Evidence. In an action for libel where injury to one's business is alleged, the amount of his sales for the year in which the libel was published may be shown in evidence, though it covered some time previous to the publication; but the defendants should not be precluded from drawing out the facts in detail afterwards, so as to enable the jury to distinguish between the business before and after the publication.

Evidence: Inferences from facts. The rejection of questions calling only for the witness' inferences from the facts he has testified to, is not error where no facts upon which an opinion could be based are excluded, and where the inference sought to be raised is one the jury could as well draw as the witness.

Words: Peculiar meaning in a business: "Agent." It is competent to show that a word has acquired a peculiar meaning in a certain business, as for instance, "agent" in the piano trade, and to construe it accordingly when it is made use of in reference to that business.

Libel: Other similar publications: Malice. Other similar publications, made by defendants on the same or the following day, are held competent evidence in an action for libel, as bearing on the question of malice.

Libel: Evidence: Rebuttal. In an action for libel for publishing a statement in substance that the plaintiff who was then agent for the Steinway piano alone, had formerly been agent for both that and the Knabe, and while agent for both had universally recommended the Knabe as superior in every respect, where the defendants had undertaken to prove the publication to be true, it was held competent in rebuttal to show the comparative number of each sold by plaintiff during the period he was engaged in selling both.

Libel: Justification: Proving the truth of part of the charge. To make out a defense by way of justification of libel, the truth of the publication must be proved just as it is charged; and proving the truth of a part of the charge made in the publication is not a defense.

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WHITTEMORE *v.* WEISS.

False publication: Good faith: Improper purposes. Good faith cannot protect a false publication; nor can one excuse himself for making a mistaken assault upon his neighbor's reputation by showing the absence of malice when, even had his charge been true, there was no proper purpose in bringing the matter to public notice.

Counter publications: Provocation: Mitigation. Counter publications which are not libelous and could have no force as a provocation are not admissible in evidence in mitigation of damages.

Libel: Publication actionable per se: Malice: Nominal damages: Loss of trade. When the publication is actionable *per se*, if maliciously published the recovery, though the declaration alleged as damages only a loss of trade to the plaintiff, could not properly be limited by the judge's charge to nominal damages merely, whatever the proof as to the influence upon plaintiff's business.

Evidence: Letter: Admission: "Best." A letter of the plaintiff stating that he had sold the Knabe pianos "for the best" is held not to warrant a construction which would make of it an admission that he had sold them as superior to the Steinway pianos; things may be "best" in the sense of ranking in the very first class without being superior to each other, and one piano may be best for one purpose, and another for another.

Submitted on briefs January 7. Decided April 5.

Error to Wayne Circuit.

This was an action for libel brought by Weiss against Whittemore & Stephens. The grievance complained of was the publication, over defendants' signature, on or about March 10, 1873, in the Detroit daily newspapers, of the following article:

"KNABE GRAND SQUARE AND UPRIGHT PIANO FORTES.

"These instruments having been before the public for over 30 years, have, upon their excellence alone, attained an unpurchased preëminence that pronounces them unrivaled.

"Before we had the honor of representing this magnificent instrument, the former agent had a good opportunity to test them with what he calls the king of pianos, and in every case the Knabe was chosen as the best, backed up by the judgment of the agent, in whose regard the Knabe stood preëminent, and he advised his customers to purchase the Knabe as being superior in every respect. We cheerfully refer to those parties who were guided by this agent's wisdom and purchased the Knabe in preference to the so-called 'King.' The Knabe has proven to be, after ten years' wear, magnificent in every respect and superior to all other

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pianos, just as their former agent represented while agent for both pianos.

"We cordially endorse the recommend given by the old agent for the great excellence of the Knabe piano in the past, and we are proud to say that to-day the Knabe piano stands without a rival," etc.

This publication was averred to be false and libelous, and to have been injurious to the plaintiff in his business as an agent for the sale of the Steinway pianos.

It appeared in evidence that at the time of this publication plaintiff had the agency at Detroit and for the state for the sale on commission of the Steinway piano, which was sometimes called the king of pianos; that defendants were then engaged in the sale of the Knabe piano; that the plaintiff from 1863 to 1869, with his partners, had held the agency for the sale of both pianos, and that no others than plaintiff and his several partners had been at the same time agents for both the Steinway and the Knabe piano. The several points raised and the facts upon which they are based are sufficiently set out in the opinion. The case was once before the court on demurrer, and is reported in *28 Mich., 366*. Verdict and judgment having passed for plaintiff, the defendants brought error.

D. B. & H. M. Duffield, for plaintiffs in error.

C. I. Walker, for defendant in error.

COOLEY, CH. J:

I. Several of the errors assigned relate to matters regarding which a liberal discretion must be allowed to the judge conducting the trial, or there could never be an end to litigation. Of this class was the ruling of the circuit judge in permitting the plaintiff to show what his sales were for the year 1873. The objection to this was, that the showing covered some time which was previous to the publication complained of. It might have been better, perhaps, if the

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judge had limited the showing to a period beginning with the publication, but no harm could be done by allowing it to embrace the whole year, unless the parties were precluded from drawing out the facts in detail afterwards, so as to enable the jury to distinguish between the business before and after the publication appeared. It is claimed that this was the fact, because after the plaintiff had testified that the year 1873 was not so good a year for the piano business as 1872, the defendants were not permitted to ask him whether, if the publication had not been made, he would have sold as many pianos in 1873 as in 1872. But this again must be regarded as a discretionary ruling. The plaintiff had shown that 1873 was a bad year for the piano business, and the conclusion that his sales would have fallen off in consequence was one the jury could draw as well as he could. It is not claimed that the court excluded any facts which could properly form the basis for an opinion; and if not, we cannot say there was error in not requiring the plaintiff to express his opinion upon the facts. Neither do we discover any error in the charge on this branch of the case. The jury were instructed in substance that they could award no damages for the falling off in plaintiff's business, unless they were satisfied it was in consequence of the publication complained of.

II. It is objected that the plaintiff was allowed to show that those who sold pianos of a particular make were called in the trade, "agents," though they bought and sold on their own account. The importance of the showing appears from the declaration, in which the plaintiff is described as agent. But there can be no legal objection to such evidence. It is always competent to show that a particular word has acquired a peculiar meaning in a certain business, and to construe it accordingly, when it is made use of in reference to that business.—*Coit v. Commercial Ins. Co., 7 Johns., 385; Child v. Sun Mut. Ins. Co., 3 Sandf., 26; Bancroft v. Peters, 4 Mich., 619.* Besides, it appears that the plaintiff had exclusive rights within certain territory, and sold one class of the

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pianos on commission; and we are inclined to the opinion that the court might properly take notice of a general custom to designate persons doing business in that manner as agents. But on the other ground the ruling is clearly sustainable.

III. Complaint is made that plaintiff was allowed to put in evidence other publications than the one counted upon, but like it, which were made on the same or the following day. But this was competent, as bearing on the question of malice.—*Plunkett v. Cobbett, 5 Esp., 136; Finnerty v. Tipper, 2 Camp., 72; Macleod v. Wakley, 3 C. & P., 311; Wallis v. Mease, 3 Binn., 546; Inman v. Foster, 8 Wend., 602; Kennedy v. Gifford, 19 Wend., 296; Bodwell v. Swan, 3 Pick., 376; Baldwin v. Soule, 6 Gray, 321; Smith v. Wyman, 16 Me., 14; Williams v. Miner, 18 Conn., 464.* It is said that some of them were not shown to have been made by authority of the defendants; but this objection was not taken on the trial, and we must presume the proper showing was made.

IV. The question to the plaintiff, what was the comparative number of Steinway and Knabe pianos sold by him from 1865 to 1867, seems to us proper. The defendants had undertaken to show that plaintiff while selling both pianos had recommended the Knabe as best, and this was important to their defense. The answer to this question might have some tendency to rebut that showing, and on that ground was competent.

V. The charge of the court, that to make out a defense the truth of the publication must be proved just as it is charged, and that proving the truth of part of the charge is not a defense, was excepted to, as was also the refusal of the judge to charge, that if the jury believed certain witnesses for the defense who were named, they must find a verdict for defendants. The witnesses named were called for the purpose of showing that plaintiff, while selling both pianos, recommended the Knabe as best. Their testimony was not very direct, and we cannot say that if believed it would establish

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that fact, and therefore we think the court was right in refusing the instruction requested. He was clearly right in the instruction given.

VI. The judge charged the jury that "malice is to be presumed from the publication, and its falsity; that to rebut this presumption defendants must prove that they made the publication in good faith, believing it to be true in all its essential parts, and for a proper purpose." Defendants insist that the purpose is immaterial, if they believed what they published, and made the publication in good faith. This might be so if the publication had been true; but good faith cannot protect a false publication; nor can one excuse himself for making a mistaken assault upon his neighbor's reputation by showing the absence of malice, when, even had his charge been true, there was no proper purpose in bringing the matter to public notice. If one makes an attack which the occasion does not justify, there is no injustice to him in requiring him to show its truth.

VII. The defendants requested the court to charge the jury, that they might consider a certain advertisement of the plaintiff preceding the publication complained of, and if they found that advertisement provoked such publication, they might consider it in mitigation of damages. The advertisement contained no reference to the defendants, and was only a very boastful proclamation of the merits of the Steinway pianos. The judge was right in holding that this was no provocation for a libel.

VIII. It is alleged for error that the judge refused to charge, that unless the jury should find that the publication complained of occasioned an actual injury and loss of trade to the plaintiff, then, under the declaration, which only alleged such injury, the plaintiff could only recover nominal damages. That might be true if the words had not been actionable *per se*; but being so, if the jury found they were maliciously published, the jury could not, whatever the proof as to the influence upon business, be thus limited in their verdict. In many cases it is impossible to show actual dam-

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ages, and yet substantial damages are not only awarded, but are strictly just. The case of a charge against a woman of want of chastity may be taken as an illustration. Such a charge is almost necessarily injurious, and when falsely made should be severely visited; and yet in very many cases no special damages could possibly be shown.

IX. The judge was requested to instruct the jury, that a certain letter by the plaintiff in which he had spoken of selling the Knabe pianos "for the best," was an admission that he had sold them as superior to the Steinway pianos. But that would have been a forced construction. Things may be "best," in the sense of ranking in the very first class, without being superior to each other, and one piano may be best for one purpose, and another for another. The letter seems to have been called out by some charge conveyed to Mr. Knabe that plaintiff was recommending the Steinway pianos as superior to the Knabe pianos; and while by implication at least it denies that charge, it is not clear that it goes further.

No error is discovered in the record, and the judgment must be affirmed, with costs.

The other Justices concurred.

Andrew Crawford v. William Edwards and others.

Deeds: Agreement to assume and pay mortgage: Acceptance: Grantee: Personal liability. The acceptance by the grantee of a deed conveying lands subject to a specified mortgage, and providing that he shall assume and pay said mortgage, binds him as effectually as though the deed were *inter partes*, and executed by both grantor and grantee; and such a proviso in a deed is to be treated, after acceptance by the grantee, as an express agreement on his part to assume and pay the mortgage specified.

Vendee assuming and agreeing to pay mortgage: Personal liability: Mortgagee: Foreclosure. The obligation of a purchaser who, in and by such

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an agreement in the deed he accepts, assumes and agrees to pay a specified mortgage, enures in equity to the benefit of the mortgagee, who may enforce it against such purchaser in a bill to foreclose his mortgage.

Mortgage foreclosures: Agreement to assume and pay mortgage: Principal debtor. The mortgagee may treat both the mortgagor and his grantee under such a promise as principal debtors, and may have a personal decree against either or both; and this upon the principle that the creditor is entitled to the benefit of all collateral obligations for the payment of the debt.

Grantee under obligation to pay mortgage: Defenses: Title: Mistake: Fraud. A grantee who has accepted such a deed cannot avoid liability under his agreement to pay the mortgage, on the ground that by reason of a mistake in the description of the premises he acquired no legal title, where he obtained possession under his deed of the proper premises, and the right by virtue thereof to have the mistake corrected, but instead of availing himself of that right permitted the premises to be fraudulently conveyed and delivered to a third person in order to cut off the mortgage.

Deeds: Agreement to assume and pay mortgage: Defenses to mortgage. Nor is he at liberty to show in defense that the mortgage he has assumed and agreed to pay was without consideration, and therefore not a valid claim against his grantor; the latter having seen fit to waive any defense he may have had to the mortgage, and having appropriated a portion of the purchase price coming to him to the payment thereof, his grantee is precluded from assailing its validity.

Submitted on briefs January 7. Decided April 5.

Appeal in Chancery from Berrien Circuit.

The bill sets forth that one John T. Edwards on April 23, 1866, conveyed to one Orrin Goodrich a piece of land in Berrien county, Michigan, described as follows: Commencing twenty rods south of the northwest corner of the southwest quarter of the southwest quarter of section thirty, in town four south, of range eighteen west, thence south twenty rods, thence east eighty rods, thence north twenty rods and thence west eighty rods to the place of beginning, containing ten acres of land; that Goodrich mortgaged the same back to Edwards to secure the payment of sixteen hundred dollars of the purchase price, and immediately took possession of the premises; that the deed was recorded, but the mortgage was not; that on October 1, 1867, it having been ascertained that the boundaries had not been properly described, it was arranged that Goodrich should deed back and Edwards should convey in lieu thereof nine acres of said land, viz.: Commencing twenty rods and three and

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three-eighths links south of the northwest corner of the southwest quarter of the southwest quarter of said section thirty, thence south four and sixty-nine and one-third one-hundredths chains, thence east nineteen and nineteen one-hundredths chains, thence north four and sixty-nine and one-third one-hundredths chains, and thence west nineteen and nineteen one-hundredths chains to place of beginning; that Goodrich accordingly did deed back and the deed was recorded, and that Edwards and wife thereupon gave a warranty deed to Goodrich, dated November 2, 1867, and intended to cover the premises last above mentioned, but by mistake the initial point was described as twenty rods and three and three-eighths links south of the northwest corner of the southwest quarter (instead of the southwest quarter *of the southwest quarter*) of said section thirty, etc.; that Goodrich thereupon made a new note for the sixteen hundred dollars, and to secure its payment made a new mortgage, dated November 2, 1867, designed to cover the same nine acres, but that by mistake this mortgage described the premises the same as in the deed last aforesaid, except that the south boundary was omitted altogether; that this mortgage was recorded; that Edwards on November 25, 1867, assigned this mortgage to one Green, who assigned to complainant; that in 1868 Orrin Goodrich died intestate, and his estate has never been administered upon; that in December, 1868, his heirs deeded to his widow, Alsina Goodrich, by a description like that in the deed of November 2, 1867, and she, by like description, deeded, January 7, 1869, to her son-in-law, Jakeway, subject to aforesaid mortgage, which he assumed and agreed to pay; that both these deeds were recorded; that on October 30, 1869, Jakeway and wife and Alsina Goodrich deeded by the same description to William Edwards subject to the mortgage, which he assumed and agreed to pay, and that this deed was recorded. The bill also avers that the possession originally taken under the first deed, of the premises intended to be conveyed, was maintained under all these conveyances and finally transferred to said William

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Edwards, who having bargained and sold the same, and having then discovered the mistake in the aforesaid conveyances, caused the same to be conveyed by a proper description by said John T. Edwards to one Brown for three thousand one hundred dollars on December 10, 1869, and that Brown mortgaged the same back to said William Edwards for nine hundred and sixty-five dollars; that Brown, on April 13, 1870, conveyed the same, subject to said mortgage of nine hundred and sixty-five dollars, to Sabra Adams, wife of Walter H. Adams, who is now in possession. It also charges that Brown and the Adamses had notice of the mistake in said conveyances, and of the existence of complainant's mortgage, and that said William Edwards had assumed to pay the same; and it alleges that said mortgage is past due and remains unpaid. The prayer is for an accounting of the amount due on complainant's mortgage and for a reformation of the description of the premises therein, and also in the deed from Edwards to Goodrich; and that if said Adams should be found to have purchased with notice of complainant's mortgage, the premises as rectified be sold for the satisfaction thereof; but if not, and if said mortgage of nine hundred and sixty-five dollars be still due and unpaid and belonging to said William Edwards, that it be foreclosed for complainant's benefit, and that said William Edwards be decreed to pay the balance due to complainant; and that if said nine hundred and sixty-five dollar mortgage be held by a *bona fide* purchaser, said William Edwards be decreed to pay the amount found due to complainant; and also for general relief.

The defenses set up, as well as the facts established by the proofs, are sufficiently stated in the opinion. On the hearing below, the bill was dismissed, and the complainant appealed.

Potter & Potter and *George W. Shaw*, for complainant.

F. Muzzy, for defendants.

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MARSTON, J:

Orrin Goodrich during his lifetime was liable, and after his decease his estate was subject, to the payment of the sixteen hundred dollar mortgage of November 2, 1867. There can be no question but that there was a mutual mistake made in describing the nine acres of land intended to be conveyed in the second deed from John T. Edwards to Mr. Goodrich. Goodrich, at the time this second conveyance was executed, was in the actual possession of the land under his first deed, in which it was properly described, and he remained in possession, after receiving the second deed, until the time of his death in 1868. After this his widow and heirs, and their grantees, continued in possession claiming under the deed of November 2, until the conveyance of October 30, 1869, to William Edwards. No mistake up to this time had been discovered, or if it had, it was not known to any of the heirs or grantees of Orrin Goodrich. There can be no doubt, therefore, but that up to the time (December 10, 1869) when John T. Edwards conveyed by proper description these lands to Francis P. Brown, the parties interested might, upon discovering the mistake, have had it corrected.

Alsina Goodrich, the widow of Orrin, was interested in having this one thousand six hundred dollar note and mortgage paid. At the time she conveyed the premises to her son-in-law, Jakeway, a clause was inserted in the deed by which he assumed the payment of this mortgage, and he also bound himself not to sell the land without the consent of Mrs. Goodrich, during her lifetime. Upon the 30th day of October, 1869, Jakeway, then claiming to own this property, and being in possession, conveyed the same to William Edwards, Mrs. Goodrich joining in this conveyance. The consideration expressed in this deed was twenty-five hundred dollars, and it is conceded the property was worth that amount. That deed contained this clause: "This conveyance is made subject to a certain mortgage of sixteen

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hundred dollars ($1,600 00) executed by Orrin Goodrich to John T. Edwards, and supposed to be dated April 4, 1866, which the party of the second part hereby assumes and agrees to pay as part of the above consideration." Passing for the present all question as to the acceptance of this deed by William Edwards, as well as the mistake in the description, what new rights and liabilities were created by this clause inserted in the deed?

The acceptance of such a deed binds the grantee as effectually as though the deed had been *inter partes*, and had been executed by both grantor and grantee.—*Trotter v. Hughes, 2 Kernan, 78.*

This must be treated, therefore, as an express agreement on his part to assume and pay that mortgage. It is more than a case of a conveyance of mortgaged property subject to the mortgage. In such a case the property would be made primarily liable for the debt, but the grantee would not have assumed, and would not be personally liable for its payment. Here, however, he expressly assumes and agrees to pay the mortgage, and that irrespective of the value of the land covered by the mortgage. The amount of the mortgage is deducted from the consideration which he otherwise has assumed to pay for the land. That amount he has retained in his hands for that express purpose. His grantor, whose duty it was to pay, might have insisted upon payment to him of the entire consideration, and paid it himself. By permitting his grantee to deduct this amount from the consideration and retain it, he has thereby rendered himself less able to meet the obligation, thereby reducing the mortgagee's personal security, but has at the same time to a corresponding amount aided the other to meet it.

Why then should not the grantee be held personally responsible to the mortgagee for the amount which he has thus assumed and agreed to pay? It is no injustice to the grantee to require him to pay it, because he has been permitted to deduct and retain that amount from the agreed

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consideration and value of the land. The consideration he agreed to pay at the time he made the purchase, should be paid by him at the time and in the manner agreed upon, and there is nothing inequitable in requiring him so to do.

The obligation of the purchaser, when he assumes and agrees to pay the debt, enures in equity to the benefit of the mortgagee, who may enforce it against the purchaser, in a bill to foreclose his mortgage.—*Blyer v. Monholland, 2 Sanf. Ch., 478.*

It was said in *Earl of Belvidere v. Rochfort,* cited in *Hoff's Appeal, 24 Pa. St., 205,* "The plain intent of the deed was to put the purchaser in the place of the vendor, and that he might not be longer liable to the mortgagee, a sufficient part of the purchase money was left in the purchaser's hands for satisfaction of the mortgage, the purchaser thereby taking upon himself the vendor's bond and covenant for payment of the mortgage as fully as if he himself had covenanted to pay it off. And either the vendor or mortgagee might, upon that contract, have compelled him to pay it off." Of course the vendor would not be discharged upon his grantee's making such a promise, except at the option of the mortgagee. The mortgagee may treat both the vendor and his grantee as principal debtors to him, and have a personal decree against either or both.—*Corbett v. Waterman, 11 Iowa, 86; Thompson v. Bertram, 14 Iowa, 476; Curtis v. Tyler, 9 Paige, 435; Halsey v. Reed, 9 Paige, 451.* These last cases also hold that the grantee under such a promise would be liable to have a personal decree rendered against him under the statute of that state, which is similar to § *5150* of our *Comp. Laws.*

The principle upon which this rests is, that the creditor is entitled to the benefit of all collateral obligations for the payment of the debt, which a person standing in the name of a surety for others has received for his indemnity, and to relieve him or his property from liability for such payment.

In addition to the authorities cited, see *Marsh v. Pike,*

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10 Paige, 595; Burr v. Beers, 24 N. Y., 178; Converse v. Cook, 8 Vt., 164; Hoff's Appeal, 24 Pa. St., 200; Lennig's Estate, 52 Pa. St., 138; 2 Wash. on Real Pr., 193 (571).

Defendant William Edwards says he did not accept of this deed, and had no knowledge that there was any such agreement on his part contained therein, until after the commencement of this suit, and that as he obtained no title to the premises in question, on account of the mistake in the description, even had he accepted of the deed and so agreed, he ought not to be held responsible.

His answer and the testimony in the case shows clearly, that he knew Orrin Goodrich, and those claiming through and under him, had been in the actual possession of this property from April, 1866, to October, 1869, claiming to be the owners thereof and to have acquired title thereto from his brother John T. Edwards; that a mortgage had been given to John T. Edwards by Orrin Goodrich for a part of the purchase money, which was outstanding and unpaid; that as they were unable to pay this indebtedness, John T. was desirous of purchasing their interest in the premises; that the parties who were to make the conveyance would take defendant William Edwards' note for nearly the entire consideration to be paid; that he then inquired of John T. whether there were any mortgages or encumbrances on the land, and was informed than there was no incumbrance that would trouble him. He thereupon delivered his note to John T., payable to Alsina Goodrich, for the amount agreed upon, "with which he supposed said John T. Edwards intended to purchase the interest of said Alsina Goodrich and Gaudier F. Jakeway and wife, in and to said land, and take a deed in this defendant's name, as a security to him, and turn the same to the best account he could in payment of his debts." At the time he gave this note he says he supposed he was to receive a deed of the premises in question. He claims to have had no knowledge whatever, and that he was not consulted at all, about the sale and conveyance by

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John T. by correct description to Brown. Yet at the time of this conveyance a mortgage was executed by Brown to William Edwards for nine hundred and sixty-five dollars,—part of the purchase money. This mortgage he accepted, retained, and collected a portion thereof.

There are other strong facts and circumstances in the case tending to show that William Edwards knew what was being done; that a deed was to be made to him of the premises, and that he expressly agreed, before the deed was drawn, to assume and pay this mortgage. I am satisfied from a careful reading of the evidence that William Edwards knew of the conveyance to himself, of the mistake, and of the conveyance by correct description to Brown; that there was an object in all this which would not bear inquiry and investigation, and, to put it in the mildest form, that he studiously closed his eyes to what was going on, omitted to make inquiries, when he should have made them, was willing that others should manage the business, he being a mere instrument in their hands.

I am of opinion, therefore, that he is entitled to no protection upon the ground of ignorance of what was going on, or because he did not accept this deed. Under the circumstances it is too late, and comes with rather bad grace, to disclaim having any knowledge that a conveyance was made to him. I am also of opinion that under the circumstances in this case William Edwards is in no position to avoid liability under his agreement because on account of the defective description he obtained no title under that deed. It is true that he acquired no legal title thereby, but he obtained possession of the premises. He obtained the right under his deed to have the mistake corrected, and if he did not avail himself of that right, but permitted a conveyance to be made direct from John T. to Brown in order to cut off this mortgage, he must not expect a court of equity to step in, sanction and complete the transaction thus fraudulently commenced, in order that he may be the gainer thereby.

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Defendant William Edwards further insists that, on account of the mistaken description in the deed from John T. to Orrin Goodrich, there was a failure of title, therefore no consideration for the note for the purchase money which this mortgage was given to secure; that Orrin Goodrich, if living, would not be, and his heirs for the same reason are not liable on that note, and that he is entitled to the benefit of this defense.

A similar theory was set up in *Comstock v. Smith, 26 Mich., 321*, but held no defense. That case disposes of this question.

I am of opinion that the decree of the court below should be reversed, and a decree rendered in favor of the complainant and against the defendant William Edwards, for the amount due upon the sixteen hundred dollar note of November 2, 1867, with costs of both courts, and that complainant have execution therefor.

The other Justices concurred.

Albert Turner v. The People.

Criminal law: Preliminary examinations: Specific finding: Statute construed. Under our statutes it is not requisite that an examining magistrate should make and return or keep any record of a specific finding as to the commission of the offense charged, or as to there being probable cause to believe the accused committed it, but if he either let him to bail or commit him for want of bail or because the offense is not bailable by a justice, and certify and return all the examinations and recognizance, that is all the statutes contemplate as essential as the basis for filing an information.

Criminal complaints: Offenses not cognizable by a justice. A complaint for the arrest of one charged with an offense not cognizable by a justice is not required to set forth with precision and in formal and distinct terms the exact criminal act to be inquired into and prosecuted; the complaint is not designed to fix and control the after proceedings as to the title of the offense or the date of it; but it is the examination on oath which immediately follows, and is required as a consequence of the complaint,

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that is to guide the magistrate in deciding whether a warrant ought to issue, and if so, for what.

Informations: Preliminary examination: Offense charged. It is not competent to charge in an information an offense for which no preliminary examination has been had or waived; and to determine whether such an examination was had as to any specific offense charged in the information, recourse can be had only to the examinations returned and filed by the magistrate.

Criminal complaints: Examination: Rape: Time. A complaint and examination which, though informal and inartificial, contains the substance of a charge upon oath that the accused committed the crime of rape on complainant, at a placed named, on or about January 4, 1873, and also between January 20, 1873, and September 30, 1874, is sufficient to authorize the magistrate, and to make it his duty, to issue a warrant for the arrest of the accused.

Rape: Preliminary examination: Time of alleged offense. And upon the arrest of one thus accused, it is competent and the duty of the magistrate to inquire, on the preliminary examination of the prisoner, in regard to the commission of the offense on any particular occasion between January 20, 1873, and September 30, 1874.

Preliminary examinations: Trials: Criminal pleadings: Precision. A preliminary examination before a justice is in no proper sense a trial, and the rules and principles which govern in respect to the frame and construction of criminal pleadings, the scope and import of trial issues, and the relevancy of evidence thereto, are not applicable to such proceedings.

Preliminary examinations: Identification of offense: Time: Informations. Where the depositions taken on the preliminary examination specify and identify by a number of coincident facts and circumstances a particular offense which the complainant states she thinks was in May, 1874, this will justify an information charging the offense as of May 5, 1874, and a conviction based upon evidence tending to prove the identical offense thus identified and singled out.

Informations: Time: Variance. Time is not an ingredient of a criminal offense in any such sense as to make it necessary to charge it precisely according to the truth; but the information or indictment may state one time and the proof show a different one without involving an objectionable variance.

Rape: Resistance: Fear. The submission to the jury in a trial for rape of the question whether the accused put the prosecutrix in such fear as to preclude her from offering resistance, is held not error.

Practice: Exceptions. The practice of taking general and obscure exceptions at the moment, in order to cover the case and enable counsel on subsequent critical examination to raise points which have never been suggested at all to the mind of the trial judge, is objectionable on many grounds, and is contrary to the theory upon which points are allowed to be raised by exceptions.

Rape: Resistance: Threats: Fear. Evidence given in explanation of delay on the part of the prosecutrix in making complaints, that she, being a young girl, and living in defendant's family, was afraid to go away for fear he would bring her back and treat her worse than ever, and that he threatened to kill her if she exposed him, is not open to the objection that it tends only to show the fear of a future possible or threatened danger, and not one presently impending.

Rape: Delay in making complaint: Res gestæ: Credibility. Delay in making complaint is not a fact belonging to the *res gestæ*, but is only mate-

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rial as bearing upon the credibility of the prosecutrix; and the credibility of her testimony, like that of other witnesses, is a matter for the consideration only of the jury.

Allegation of error: Record. An allegation of error will not prevail unless the record as made up affirmatively shows that the error alleged was in fact committed.

Practice: Charge to the jury: Allegation of error: Record: Presumptions. Where complaint is made of a charge to the jury, in reference to a claim that the credibility of the prosecutrix as a witness was destroyed by her denial on cross-examination of having given certain testimony before the examining magistrate, which suggested that the deposition taken before the magistrate might not contain the exact words of the witness, but the bill of exceptions does not set forth the deposition or the cross-examination, nor show that the deposition contained in fact what the witness denied, it will not be presumed in support of the allegation of error that there was a material variance between the deposition and the testimony such as to involve a substantial contradiction under oath.

Charge to the jury: Rape: Character of prosecutrix. A proposition in a charge to the jury in a rape case, that it made no difference what the complaining witness did before or since the act if the defendant committed the crime as alleged, is construed, in connection with the rest of the charge, which explicitly submitted to the jury the question of the credibility of the prosecutrix and the reasonableness and probability of her testimony, to mean no more than that if the imputed fact was committed it was equally a rape whether the character of the prosecutrix was good or bad, and so construed is held not to be error.

Heard January 14 and 18. Decided April 5.

Error to Huron Circuit.

R. Winsor, C. H. Gallup and *H. B. Carpenter,* for plaintiff in error.

Andrew J. Smith, Attorney General, for the people.

GRAVES, J:

Turner was convicted in June, 1875, in the circuit court for Huron county, upon a charge of rape on Emma Thompson in May, 1874, and is now undergoing sentence given on such conviction.

On arraignment in the circuit court, and before pleading, he moved to quash the information on the following grounds, in substance:

First, That he had never been examined on the specific charge set out, or had waived his right to be examined in regard thereto;

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Second, That there had been no finding made by an examining officer that the offense described had been committed, nor any adjudication or finding by any such officer that he, Turner, was probably guilty of such offense, nor any determination requiring him to appear and answer to a charge therefor before the circuit court.

As matter of fact, he had been examined before a justice of the peace, under a complaint and warrant imputing to him a charge of rape upon Emma Thompson, named in the information, and these proceedings having been certified by the justice to the circuit court and there filed, the prosecuting attorney had based the information upon them. And on presenting the motion to quash, these proceedings were relied on by the plaintiff in error as evidence to support the motion, and his counsel read the complaint and warrant of arrest, the return made by the justice, and a portion of the examinations to establish the correctness of his position.

The court overruled the motion and required the plaintiff in error to plead, and he thereupon pleaded not guilty. On the coming in of the verdict, a motion in arrest of judgment was made, based upon the same ground as the motion to quash, and this the court likewise overruled. These, and other rulings, made in charging the jury, are now before us in a bill of exceptions brought up on writ of error. As the two motions raise the same questions, there is no need for separate consideration.

The grounds of the motions, in the form in which they were stated, were deductions of the mover, and the true points contended for can hardly be apprehended without explanation; and this can only be obtained with fullness by recurring to the brief and arguments.

As already intimated, the plaintiff in error practically asserted that there had been a complaint, a warrant of arrest and an examination. The real claim was, that these proceedings were defective and were not competent to be a basis for an information charging an offense on May 5, 1874.

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The substance of the argument may be indicated by three propositions:

First, It was indispensably necessary that the complaint prior to the warrant should distinguish and charge the precise criminal act, to be followed up by a warrant and examination, and that the subsequent examination was required to be exclusively referred to such charge, and the respondent was not liable to be held, in consequence of the proceedings, for any other charge; that neither the complaint nor examination marked out a charge as one on which Turner was to be held for an act done on May 5, 1874;

Second, If the complaint was valid to support an examination for any specific criminal fact, it could be so deemed only by considering it as identifying and alleging an offense on the 4th of January, 1873, and the complaint being thus construed, the whole examination of Turner was required to be confined, and must be referred to the specific transaction so pointed out, and it could not have been legally extended, and cannot be referred to a transaction of a later date by several months;

Third, It was indispensable for the legal completion and shaping of the proceedings to warrant an information, that the justice should have found that the specific offense alleged had been committed, and that there was probable cause to believe that Turner committed it. It was likewise necessary that such findings should be certified to the circuit court by the justice.

Assuming for the present that the proceedings before the justice were not impeachable for any thing suggested in the first and second propositions, but were a sufficient foundation for the information notwithstanding, it is then, we think, pretty clear that the objection implied by the last proposition was unwarranted.

The statute requires the justice, after "an examination of the whole matter," to come to an opinion as to whether or not an offense has been committed, and if of opinion that there has been, then as to whether there is probable cause

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to believe the accused guilty thereof, and thereupon to discharge or hold him to answer, according to the conclusion reached.—§§ *7859, 7860, C. L.* But no record of a specific finding one way or the other is required to be kept or certified to the circuit court. If on "examination of the whole matter" it appears to the justice that an offense not cognizable by him has been committed, and that there is probable cause to believe the accused guilty, it is then the duty of the justice, if the case is bailable by him and sufficient bail is offered, to accept it and discharge the accused; and on the other hand, if the offense is not thus bailable, or being thus bailable if no sufficient bail is tendered, it is then the duty of the justice to commit the accused for trial.

In case the accused is held for trial the justice is required to "forthwith certify and return all examinations and recognizances" to the clerk of the court where the accused is bound to appear, and in case of failure the court is expressly authorized to compel return.—§ *7867, C. L.* In case the justice commits for want of bail, he is commanded to certify on the mittimus the sum for which bail was required.—§ *7875, C. L.*

This mittimus would naturally recite the conclusion reached on examination, but the mittimus is not an authority for filing an information. It is simply an authority to the sheriff and jailer to receive and hold the accused, and it is not to be filed in court or with the clerk. When the examinations and recognizances given by the accused and by witnesses are certified and returned, the statute is satisfied, and if bail is given, a return of the recognizance affords strong record evidence of the conclusion which the justice must have reached. The fact of taking bail imports the decision of the justice, and the fact of giving it imports a recognition of it by the accused. In the present case the plaintiff in error gave bail, and the justice certified the examinations.

The next point relates to the necessity of setting out in formal and distinct terms in the complaint the precise criminal act to be inquired into and prosecuted.

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When, as in this instance, the complaint concerns an offense not triable by a justice, no such formality as the objection supposed is at all necessary. The statute does not intend it, and the nature of the proceeding makes against the propriety of exacting such formalities.

The fact itself of a complaint is needed to set the law in motion; but the statute does not prescribe any form in which the complaint must be made, and does not, in terms at least, even require that it shall be made in writing. Apart from some exceptional cases, as for adultery, it may proceed from any one, however illiterate or however unversed in the forms of procedure, who is able from acquaintance with facts to inform the magistrate that some particular crime a justice cannot try has been committed. Indeed, except in respect to special cases, as before mentioned, the law makes it the duty of every one, however unskilled in technical knowledge or uneducated, to inform against criminals, and failure to perform the duty cannot be answered by setting up inability to describe crime in the language of the law, or inability to read and write. Upon the fact of a complaint, the magistrate is moved to act. Then he must examine on oath the complainant and witnesses produced, to ascertain the truth, to develop particulars and find out whether there is proper cause, and if so, of what nature, for the issuance of a warrant. Whether there is ground for a warrant, and if so, for what, is not supposed to be necessarily made known by the complaint, and the law does not assume that the complaint must fix and control the after proceedings in regard to the title of the offense, or the date of it.—*People v. Annis, 13 Mich., 511.* The examination on oath, which immediately follows and is required as a consequence of the complaint, is the proceeding which the statute looks upon as the one to guide the magistrate in deciding whether a warrant ought to issue or not, and if so, for what.—*People v. Lynch, 29 Mich., 274; Pardee v. Smith, 27 Mich., 33.* The statute says expressly that "if it shall appear from such examination that any criminal

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offense not cognizable by a justice of the peace has been committed, the magistrate shall issue a warrant," etc., "reciting the substance of the accusation," etc.—§ *7845, C. L.*

True it may often happen that the complaint is at once reduced to writing, and that the examination preceding the warrant is combined, but the admissibility and reasonableness of such a course cannot add to or change the legal significance and requisites of a complaint.—§§ *7844, 7845, 7855, 7859, 7860, C. L.;* and §§ *2, 3, 13, 20, 21, of Tit. 2, Pt. 4, ch. 2, N. Y. R. S. of 1830; Stewart v. Hawley, 21 Wend., 552; Payne v. Barnes, 5 Barb., 465; People v. Hicks, 15 Barb., 153.*

Another circumstance tends to show the nature and office the legislature ascribed to the complaint and other proceedings prior to the warrant. The law contemplates that there is no necessity that the magistrate who examines after the arrest, and who must decide whether the accused shall be held or not, should have before him the complaint or any of the proceedings prior to the warrant. Because it is expressly provided that if the magistrate who issues the warrant is absent or unable to attend, the accused shall be taken before some other magistrate of the same county, and that the warrant, with a proper return thereon, signed by the person who made the arrest, shall be delivered to the magistrate.—§§ *7850, 7851, C. L.* The law here contemplates that the warrant will contain the substance of the accusation as shown by the examination made before its issue.—§ *7845, C. L.* With the exception of some few amendments not material to the present inquiry, this chapter for the arrest and examination of offenders was made before the law of 1859 allowing criminal prosecutions on information, and it was established as a branch of a system of criminal procedure which did not permit one held on examination for a criminal offense to be arraigned for trial until after an investigation by a grand jury, and an accusation by that tribunal through the form of an indictment. In view of

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such an arrangement, there could be no pretense for requiring any thing technical in the structure of the proceeding to initiate the first inquiry, and which at the most could only eventuate in holding the party subject to the action of a grand jury. The fact that the intervention of that tribunal is now made not essential cannot add, however, to the legal provisions as to the form and function of the preliminary complaint. The law is set in motion, and the magistrate caused to act, in the same way now in the first stage as when the accused could be tried only after indictment.

The remaining question raised by the motions is, whether upon the strength of the examinations returned the prosecuting attorney was authorized to inform for the act described in the information.

The statute provides that no information shall be filed against any person for any offense until such person shall have had a preliminary examination as provided by law, unless the right thereto is waived.—*S. L. 1859, pp. 391, 393, § 8.* And it provides likewise that the prosecuting attorney shall inquire and make full examination of all the facts and circumstances connected with any case of preliminary examination touching the commission of any offense, and in case he determines that an information ought not to be filed, he shall file with the clerk his statement of reasons in law and fact for not informing, "provided that in such case such court may examine said statement, together with the evidence filed in the case, and if upon such examination the court shall not be satisfied with said statement, the prosecuting attorney shall be directed by the court to file the proper information and bring the case to trial."—*§ 6 of act of 1859,* as amended in 1863, *S. L. 1863, p. 279.*

In the present case the prosecuting attorney decided to inform for the offense set up in the information, and the court, on the motion to quash, decided that the "evidence filed in the case" authorized it.

If it appears, however, that as to the offense charged in the information there had been no preliminary examination,

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then it was not competent to inform for it, and the prosecuting attorney and the court were equally at fault.

But in order to ascertain how this is, we can only have recourse to the "examinations," or in the equivalent terms of the proviso, to the "evidence filed in the case." Because no other matter of evidence is required to be returned and filed (§ *7867, C. L.*), and it is to such evidence the prosecuting attorney is plainly referred in order to shape his information, and the same evidence which is to govern the court when directing a "proper" information to be filed. All the regulations point to it as the evidence to discriminate the criminal act to be laid, and to disclose its class and character. Indeed, on this subject the law appears clear when the various provisions are examined and compared.

Before proceeding to introduce the charge as preferred in the information, or any of the "examinations" or "evidence" certified and returned by the justice, it seems proper to advert to the views heretofore expressed by this court in four or five cases in regard to the nature and purpose of these examinations, and the construction they should receive.

It was observed in *Hamilton v. The People, 29 Mich., 173, 176,* that "the justice in these examinations does not act judicially in the technical sense, but in his capacity of a conservator of the peace, and the proceeding is one which at common law was conducted very much at discretion." In *People v. Lynch, 29 Mich., 274–9,* the court say in regard to the examination after warrant, that "the object of that examination is, not to determine the guilt or innocence of the accused, as upon a trial, but whether there is probable cause for believing him guilty; and if the justice thinks from the evidence on the examination that there is such probable cause, he is to cause him to be committed or enter into recognizance so as to secure his presence at the circuit court for trial." In *Lightfoot v. The People, 16 Mich., 507, 512,* a majority of the court then sitting, in speaking of the force and use of depositions taken on examinations and returned by the justice, observed that the law

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"presumes that those statements of witnesses were the only ground on which the prisoner was regarded as worthy of being charged as culpable, and put upon his trial for the offense alleged." *Hanna v. The People, 19 Mich.. 316*, was a case where the prisoner was informed against for an assault with intent to murder, being a felony, but the jury convicted him of assault and battery, being a misdemeanor; and the point was made, that he had never been examined on the charge of a misdemeanor, but the court said, *p. 323:* "This being included in the charge of the felony, an examination upon the transaction claimed to constitute the higher offense was an examination upon the minor charge included in it."

The subject is further alluded to in some of these and in other cases, but is noticed with the most particularity in the earlier case of *The People v. Annis, 13 Mich., 511*, and not, as incorrectly entitled in the report, *Annis v. The People.* After referring to the law for prosecuting by information, and the preliminary examination contemplated, the court say: "The examination under this statute was designed to some extent to accomplish the purpose of a presentment by the grand jury under the law as it existed before, in protecting a party against being subject to the indignity of a public trial for an offense, before probable cause had been established against him by evidence under oath. But it was never designed that the complaint or warrant before the magistrate should stand in the place of a formal presentment, nor that in the circuit court the prosecuting officer should be limited by it in the mode of charging the offense. It is undoubtedly competent for him, so long as he does not undertake to proceed against a person for a different transaction than that to which the examination relates, to put his information in such form as in his opinion will enable him to try the offense on its merits in the way most effectually to advance the ends of justice."

On turning to the record in the case before us, it appears that the complaint was reduced to writing, and that the

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examinations previous to the warrant were combined with it, and were recited at length in the warrant. Those proceedings were all taken on the third of May, 1875, and, as the record states, the complaint and the examination before warrant were as follows:

"STATE OF MICHIGAN, HURON COUNTY,—ss.

"The complaint and examination on oath and in writing of Emma Thompson, of the township of Lake, taken and made before me, George McKay, a justice of the peace for the township of Lake in said county, upon the third day of May, A. D. 1875, who, being duly sworn, says that heretofore, to-wit: on the fourth day of January, A. D. 1873, at the township and in the county aforesaid, Albert Turner, late of the township of Lake, in the county of Huron, on the fourth day of January, in the year of our Lord one thousand eight hundred and seventy-three, with force and arms, at the township aforesaid in the county aforesaid, in and upon one Emma Thompson, a female of the age of ten years or more, to-wit: of the age of thirteen years, then and there being, violently and feloniously did make an assault, and her, the said Emma Thompson, then and there by force and against her will, feloniously did ravish and carnally know, against the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of Michigan. And Emma Thompson aforesaid, upon her oath aforesaid, does further say, that heretofore on other times, to-wit: on the twentieth day of January, A. D. 1873, and on divers days and times between the said twentieth day of January, A. D. 1873, and the thirtieth day of September, A. D. 1874, at the township of Lake and in the county of Huron aforesaid, Albert Turner, late of the township of Lake in the county of Huron aforesaid, in and upon one Emma Thompson, single woman and not the wife of the said Albert Turner, a female of the age of ten years or more, to-wit: of the age of thirteen years, then and there being, violently and feloniously did make an assault, and her, the said Emma Thompson, then and there by force

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and against her will, feloniously did ravish and carnally know, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of Michigan; wherefore the said Emma Thompson prays that the said Albert Turner may be apprehended and held to answer this complaint, and further dealt with in relation to the same as law and justice may require.

her
"EMMA + THOMPSON.
mark

"In presence of James H. Hall.

"Taken, subscribed and sworn to before me the day and year first above written.

"GEORGE MCKAY, *Justice of the Peace.*"

However informal and inartificial, this complaint and examination certainly contained a charge upon oath that Turner had committed the crime of rape on complainant in Lake township in Huron county, on or about the fourth day of January, 1873, and also between the twentieth of January, 1873, and the thirtieth of September, 1874, and the justice concluding therefrom that a "criminal offense not cognizable by a justice of the peace had been committed" *(§ 7845, C. L.)*, and that an examination on oath in Turner's presence ought to be had "in regard to the offense charged, and in regard to any other matters connected with such charge" which the examining magistrate might deem pertinent on such examination *(§ 7855, C. L.)*, proceeded to cause Turner's apprehension, to the end that he might "be dealt with according to law."—§ *7845*.

In this the justice was certainly correct. There was sufficient not only to prompt him to act, but to make it his duty to act, and there can be no possible question but that he had full jurisdiction on the strength of the complaint and examination to take steps under the statute to call Turner before him for the purpose of a due investigation in Turner's presence. And there can be no question but that it was perfectly competent, if not a duty, to inquire upon

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such examination in regard to the commission of the offense on any particular occasion between the 20th of January, 1873, and the 30th of September, 1874. The statute contemplates an inquiry, to find out whether reasonable ground exists for going further, and the proceeding in no proper sense is a trial, and an application to it of the rules which govern in respect to the frame and construction of criminal pleadings, the scope and import of trial issues, and the relevancy of evidence thereto, would go far to defeat its object. To answer any useful purpose the inquiry must not be hampered by the restrictions which are wisely provided for the later proceedings, and without sacrificing or infringing any privilege or benefit the party implicated may regularly claim, the examining magistrate must be allowed the exercise of a large discretion. And the range and essence of this discretion must be judged of in view of the fact that it pertains to a preliminary examination or inquisition to see whether a trial or definite investigation ought to be had, and not to such trial or definite investigation itself. It would be absurd to apply the same principles to an investigation designed to find out whether grounds exist for making a precise and formal accusation, that are proper after the grounds are regularly disclosed. So long as they are not ascertained, they are not to be set up as something to control the inquiry carried on to ascertain them.

Acting upon the opinion that the investigation was not required to be confined to the first allegation in the complaint and warrant, the justice extended it to the second, and this was clearly authorized. But the only evidence on the subject inserted in the record consists of a part of the deposition made by the complaining witness. It is unnecessary to repeat it here. It is very distinct and clear in the details and in its relation of facts and circumstances going to single out and identify a particular offense, and the witness states that she thinks it was in the month of May, 1874. The occurrence is minutely particularized in other respects. A large number of coincident facts are

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given, and among them she stated the act was committed in the sugar bush; that in the forenoon of the same day herself and Turner's wife went out to gather what sap remained in the troughs, in order to make vinegar of it; that between eleven and twelve Turner came to the bush and told his wife to go to the house and get dinner; that witness inquired if she did not want her help, and that Mrs. Turner said she did not and then left for the house; that Mrs. Turner returned, but during her absence, and just before her return, the criminal act was done; that shortly afterwards Turner and his wife and the witness proceeded to the house, and that on the way there, upon her refusal to allow him to take hold of her hand and assist her to jump from a log across some water, he broke off a basswood sprout and struck her with it several times, and that she then screamed; that they reached the house and had dinner; that the next day or two Lizzie Devine called at the house and stated that she and her sister were looking for cows and wanted to know if it was witness who screamed, alluding evidently to the outcry said to have been made during the return of witness from the sugar bush to dinner.

By this evidence the transaction it referred to was liquidated and identified by the group of facts specified, with their mutual relations, as plainly as a well ascertained locality is marked and denoted by the nature, shape and relations of its numerous physical monuments. True, the precise date was not stated in terms, and it was not indispensable that it should be. The witness mentioned the time, but not positively, as in May, 1874, and there is nothing shown to discredit the correctness of the statement. There is no room for claiming that the least ambiguity existed in regard to the identity of the transaction referred to in this evidence, and no ground for saying there was no preliminary examination in regard to it. The prosecuting attorney had to gather from the examination the identical fact for which to accuse, and the foregoing evidence afforded him the means,

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but it did not afford him the means to enable him to state positively and certainly the exact day.

This, however, was not important so long as the facts and incidents precluded all doubt respecting the identity of the transaction to be prosecuted, and so long as it was manifest that the act was recent enough to be subject to prosecution, and that a preliminary examination in regard to it had been had. Time is not an ingredient of the offense in any such sense as to make it necessary to charge it according to the truth. The information or indictment may state one time and the proof show a different one without involving an objectionable variance.—§ *7923, C. L.* The deposition of the complaining witness, as we have seen, tended to show that the transaction at or near the sugar bush was in May, 1874, and it does not appear that the evidence on examination tended to show any other in that month. The information preferred a single charge, and in the usual form laid the act as of May 5th, 1874. There was nothing more in the description of the offense in the information to point out the transaction aimed at, but there is no rule of criminal pleading which requires the setting out ear marks or the identifying facts and incidents elicited on examination. They must be matter of proof on trial. Still the information was grounded on the examination, and that confined the prosecution within limits. It is not pretended that the information was otherwise than good upon its face, and as the charge was shaped in it, the affair at or near the sugar bush was provable to support it without raising any question of variance from the information or the examination.

Passing to the later proceedings, it may be well to see whether in fact the charge in the information was applied to the affair at or near the sugar bush or to some other.

The bill of exceptions does not set forth the evidence, but in a very brief and general manner speaks of its tendency, and in mentioning that says in substance there was

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evidence tending to prove that Turner committed the offense in question on Emma Thompson "some time in the fore part of May, 1874," and that this was the first offense proved on the trial. No mention whatever is made of any of the facts and incidents which would particularize the transaction and identify it with or discriminate it from the affair before alluded to. That there was evidence, however, that the transaction of the fore part of May was the same as that described as having occurred at or near the sugar bush, and that the conviction was on account of that transaction, appears clearly from the record. The second, third and fourth propositions of the judge's charge, which were not excepted to, make this matter very plain. These propositions are as follows:

"2. Under the statute the people charge that Albert Turner had connection with the girl Emma Thompson on or about May 5th, 1874, by force and against her will.

"3. This is the time the girl claims she was forced at or near the sugar bush, and of the rape at this time and place the defendant must be convicted, if convicted at all.

"4. She has been allowed to testify as to other times and places for other purposes; but he can only be convicted of a rape at the time and place charged. If he is not guilty of that, no matter how many other offenses he committed, he cannot be convicted here unless he committed the particular one charged."

The conclusion, then, on this part of the case is, that the plaintiff in error had a preliminary examination in regard to the transaction said to have occurred at or near the sugar bush in May, 1874; that on such examination the justice held him to answer for said transaction; that the prosecuting attorney informed against him on account of it; that he was tried therefor and finally convicted thereof.

Error was assigned on a portion of the charge which submitted to the jury whether Turner put the prosecutrix in such fear as to preclude her from offering resistance to the commission of the criminal act, but this objection is very

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properly abandoned. The brief does not allude to it.—*Strang v. The People, 24 Mich., 1; Don Moran v. The People, 25 Mich., 356.*

It is next objected that the judge erred in charging in regard to the delay of the prosecutrix in making complaint. The instructions bearing on this subject were as follows:

"I trust you all understand that one charged with crime is presumed innocent; that the people must satisfy the jury that he is guilty or he cannot be convicted; as is commonly said, the presumptions are in favor of the prisoner, and the jury must be satisfied beyond a reasonable doubt that he is guilty before they convict.

"Ordinarily it is deemed suspicious that a complaint is not made at once after the alleged commission of the offense, and in this case it appears that no complaint was made, except, perhaps, to Mrs. Turner, until long after the crime is said to have been committed. The prosecution seek to explain this by offering evidence tending to show that she dared not, through fear of Turner, make any complaint.

"If the long delay is accounted for to your satisfaction, then the delay would not prejudice her story; but if without some good and sufficient excuse she delayed some ten or twelve months to expose her destroyer, and then only told her story when she herself was charged with a crime, it is, to say the least, a circumstance against the truth of her story. The whole question of the credibility of the girl Emma and the other witness is for your consideration. The reasonableness and probability of the evidence given must not be lost sight of. Starting, then, with the presumption of innocence, have the people convinced you that the defendant is guilty of the crime charged. If they have, your verdict will of course be guilty; but, on the other hand, if you are not convinced of his guilt, you will say not guilty. Let us have neither fear, love, nor favor in deciding this question. If the man is innocent, it would be a terrible thing to doom him to a term of years in state prison. If he is guilty, as the girl Emma says, he is an unsafe man

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to have loose among the wives and daughters of the good people of Huron county. Consider carefully; weigh well; determine impartially; and render such a verdict as your judgments approve."

The evidence concerning this point, and to which the charge had reference, is not set out. But the bill of exceptions states that the evidence adduced by the people tended to show that the prosecutrix was fourteen years and four months old on the 5th of May, 1874; that she commenced living in Turner's family January 2d, 1873, and continued to live there until about April 26, 1875; that she was prevented from making complaint, and from leaving the family and seeking protection elsewhere, by Turner's harsh treatment of her, and because she was afraid that if she left he would bring her back and treat her worse than before, and because he threatened to kill her if she told any one what he had done; but that she did complain to Turner's wife after each violation of her person, but to no one else until about the 26th of April, 1875.

The bill states also that evidence was given by Turner tending to show that the prosecutrix before entering his family had been for several years an inmate of a public poor house in Bay City, and had lived at several different places in Huron county; that she had repeated opportunities to leave Turner's family, and to communicate with neighbors, between January 4, 1873, and May 5, 1874, and between that date and April 26, 1875, and had not done so, and had never in any way made complaint to Turner's wife that he had violated her person; and that when she first complained to any one of the offense charged in the information or of any other outrage against her person by Turner, she was under arrest on a charge of having concealed the death of a bastard child.

It does not appear that Turner's counsel made any request or suggestion for any charge on this subject, or the modification of that given, or even intimated any reason for being dissatisfied with it. We find simply and barely in the record

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that the plaintiff in error excepted "to that part of said charge which instructs the jury that if the delay in making the complaint is explained to the satisfaction of the jury, such delay ought not to prejudice the story of the complaining witness." Now, this exception touches only a single sentence in one of the several propositions of the charge relating to the delay in making complaint and to the evidence given to explain the delay, and the matter to which the exception is confined has a very different meaning when read in connection with the context from what it has when read separately and abstractly. If this single passage was unsatisfactory, fairness to the court and the course of justice suggested it as a duty at the very time to make known to the court the true nature of the objection in some regular way. By such action the judge would have had the benefit of the explanation in season to set the direction right if the reasons indicated were such as to satisfy him he had made a slip.

The practice of taking general and obscure exceptions at the moment, in order to cover the case and enable counsel on subsequent critical examination to raise points under the exceptions which have never been suggested at all to the mind of the trial judge, is objectionable on many grounds, and is contrary to the theory upon which points are allowed to be raised by exceptions.—*Adams v. State, 25 Ohio St., 584.* The substance of the argument made here in favor of the exception, as gathered from the brief, is, that the evidence of fear adduced to explain the delay only tended to show the fear of a future possible or threatened danger and not one presently impending, and that no such fear, if it existed, could be admitted to excuse delay. And, further, that the charge was unfair to Turner, inasmuch as it made the evidence prominent which was given to explain the delay and nearly ignored or suppressed the force of the circumstances having a counter tendency. The reasoning in regard to the kind of fear shown and that required to be shown is not well based or sound. According to the record, the

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prosecutrix swore she feared that if she left, Turner would bring her back and treat her worse than ever; and, further, that he threatened to kill her if she exposed him; and if in her situation and under the circumstances as they appeared to her, these considerations actually kept her in such fear that she dared not complain against him, it was then a fear which had constant operation, and the circumstance that the violence she was caused to fear could not be expected to take place at the very time she should expose him, but only afterwards, was of no importance. There is no room for saying, in view of the facts indicated by the record, that what the prosecutrix claims to have feared was, as a ground of fear, too far off and uncertain to preclude a jury from finding that the fear itself was enough, as she was situated, to deter her from complaining sooner than she did.

Now, whether a prosecutrix makes early complaint or not, is not a fact belonging to the *res gestæ* at all. It is only material as bearing upon the credibility of her evidence.—*3 Greenleaf Ev., § 213.* She is a competent witness, and if sworn and examined, "the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in her testimony." And one of the circumstances having a strong tendency to show that her testimony is false or feigned is her concealment of the injury for any considerable time after she has opportunity to complain.—*4 Black. C., 213, 214.* But there is no iron rule which requires complaint to be made within this or that time. She must have opportunity, and how this is must depend upon the particular circumstances. If there is considerable delay, and yet there is satisfactory reason for it in the opinion of the jury, such as that she was under the offender's control or influence, it may not detract from her credit.—*1 East P. C., 445; Higgins v. The People, 58 N. Y., 377.*

Looking at the record as it is shaped in regard to what was given in evidence, and considering the charge and the

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exception, there appears to be no foundation for any claim that the charge was unfair. It might have been more full, but Turner's counsel did not ask it, and the paragraph excepted to, when read in connection with other portions, does not appear to be objectionable on any ground suggested.

It is further objected that the judge mislead the jury in what he said concerning a claim by Turner's counsel that the credibility of the prosecutrix was destroyed by her denial on cross-examination of having given certain testimony before the justice. It would seem that while being cross-examined on the trial she "denied having given certain testimony before the justice," and that at a later stage of the trial Turner's counsel read her deposition and "claimed" that it tended to contradict and impeach her, and that in regard to this claim the judge observes: "The jury should consider the statement from the justice, containing Emma Thompson's evidence, with reference to the circumstances under which it was taken. They should remember that the exact words are not always written down, and that it is very difficult to produce on paper a full statement in the words and manner of a witness." The argument against this remark assumes that she denied having sworn to something which the deposition in fact contained, and something, too, of substance, whereby she stood self-contradicted in such a way as to affect her credibility, and that the tendency of the charge was to alleviate the effect of this upon untenable grounds. It is a sufficient answer that the bill of exceptions does not show that the deposition contained in fact what she denied having testified to before the justice, or that there was any substantial variance between her testimony at the trial and her deposition. Neither her deposition nor cross-examination at the trial is set out, and we are not informed in any way to what her denial related, nor that her deposition contained what she denied having sworn to, or even that in point of fact there was any real disagreement at all; and we cannot

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presume that there was a material variance, a variance going beyond unimportant matters and involving substantial contradiction under oath.

Whether there was any basis for the "claim" made by the plaintiff in error is not apparent, and nothing is shown to convict the charge of any injurious tendency. It was incumbent upon the plaintiff in error to bring the facts, or sufficient facts, upon the record in some form so as to show that the charge applied to a case in which, to say the least, it may have operated to his legal prejudice.

One more objection remains to be noticed. In the sixteenth proposition of the charge the judge said: "It makes no difference in the case what may have been the relations of the girl before she went to defendant's house, or what she may have done since; her character, good or bad, cannot exempt him, if you find that he committed the crime of rape in the sugar bush as alleged." There seems to have been no suggestion to the judge to modify or change this proposition in any way. Turner's counsel merely excepted "to that part of said charge which says it makes no difference what the complaining witness did before or since the act." But without dwelling on the force of the exception or pausing to question its scope or efficacy as matter of practice, it may be assumed to apply either to the passage mentioned or to the whole proposition and to be sufficient to present a point. Still the sentence mentioned in the exception, and to which the allegation of error is confined, must be read with the rest of the proposition, and the proposition must be read with the rest of the charge. The objection to the charge, as understood, is that it was equivalent to a direction that the jury might find whether Turner was guilty or not without regard to facts and circumstances bearing on the truth and accuracy of the statements of the prosecutrix, and that if they should find him guilty, such facts and circumstances would then be of no consequence. The argument does not represent the charge fairly. The question of the credibility of the prosecutrix and the "reason-

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ableness and probability" of her statement had been just before explicitly submitted to the jury, and certainly the judge did not intend to recall or destroy the force of that submission, and could not have been understood by the jury as meaning to do so.

The instruction now in question did not concern credibility at all. Viewed in connection with other matters charged, the meaning of the judge is obvious enough. What he meant, and what the jury unquestionably understood him to mean, was, that if the imputed fact was committed, it was equally a criminal fact, equally a rape, whether the character of the prosecutrix was good or bad. He certainly did not mean that if the evidence would be insufficient to convict on account of its impairment by the bad character of the prosecutrix, but would be sufficient if her bad character was not allowed to diminish the force of the people's evidence, that the jury might decide upon Turner's guilt without allowing her badness of character to impair the evidence, and if satisfied of his guilt, then ignore all the facts concerning her character.

No error being shown, the judgment should be affirmed.

The other Justices concurred.

Joshua Wilkinson v. Addison Holiday.

Contract for purchase of personal property: Title: Mutual assent. Where under a contract for the purchase of personal property something remains to be done to identify the property, or put it in condition for delivery, or determine the sum to be paid for it, the presumption is strong, but not conclusive, that by the understanding of the parties the title was not to pass until such act had been fully done; the question is only one of mutual assent.

Personal property: Transfer of title: Delivery. While delivery is usually the most significant fact to prove the transfer of title, it is not conclusive, as there may be an express understanding to the contrary, and so likewise there may be an implied one.

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WILKINSON *v.* HOLIDAY.

Title: Delivery: Mutual understanding: Question of fact. The question in this case, whether by the understanding of the parties the title was to pass with the delivery of the logs to the boom company, under the circumstances is held to be one of fact that ought to have been left to the jury.

Submitted on briefs January 19. Decided April 5.

Error to Saginaw Circuit.

This was an action to recover part of the purchase price of logs alleged to have been sold and delivered by Holiday to Wilkinson. It appeared that defendant bargained with plaintiff for the purchase of one hundred and thirty-seven white ash logs then lying in the south branch of Bad river, and paid him fifty dollars towards the purchase price. The plaintiff was subsequently during the season to run the logs as far down stream as the limits of the Bad river boom, and the logs were to be scaled under rope, and said scale to be the basis of settlement at the price of eight dollars per thousand feet. There was evidence tending to show that the logs were run down to the place designated; but the defendant denied having ever received any of them. There was no showing that they were ever rafted out of the boom or scaled under rope. There was evidence tending to show that the logs, after reaching that part of the river controlled by the booming company, were surreptitiously taken from their possession by a third person or persons. The cause was tried by jury and verdict found for plaintiff. The defendant brought error.

Gillett & Holden, for plaintiff in error.

Albert Trask, for defendant in error.

COOLEY, CH. J:

Where, under a contract for the purchase of personal property something remains to be done to identify the property, or to put it in condition for delivery, or to determine the sum that shall be paid for it, the presumption is always

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very strong that by the understanding of the parties the title was not to pass until such act had been fully done and accomplished. But the presumption is by no means conclusive. If one bargains with another for the purchase of property, and that is done in respect to it which the parties agree shall pass the title, nothing more is generally requisite. The question is only one of mutual assent; whether the minds of the parties have met, and by their understanding the purchaser has now become owner. This is the general rule where the case is not within the statute of frauds. If one purchases gold bullion by weight and receives delivery before it has become convenient to weigh it, and on the understanding that the weighing shall be done afterwards, there can be no reasonable doubt, unless there are some qualifying circumstances in the case, that the bullion has now become his property and is at his risk.—*Lingham v. Eggleston, 27 Mich., 324.*

But we do not see how the judge could say, as matter of law, that delivery according to the understanding passed the title to the logs in this case. Delivery is usually the most significant fact in such a transaction, but it is not conclusive. One may receive delivery of something he has bargained for on the express understanding that the title shall not pass until the weighing or measuring which is to determine the price has been done. And if there may be an express understanding to that effect, so there may be an implied understanding of a like character. In this case delivery was to be made, not to the purchaser, but to the booming company, and the question at issue really is, for whom was the company bailee after the logs had been so delivered. The fact that the defendant was to pay the company's charges raised a strong presumption that they were held for him, and that the company was his bailee. But, on the other hand, the fact that the logs were to be subsequently scaled in order to determine how much should be paid, had a tendency to rebut this presumption. Moreover, no credit appears to have been agreed upon, and the

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legal inference is, where that is the case, that payment was to be made before the purchaser was to be at liberty to remove the property. This fact would also tend to show that while the booming company should hold the logs they would hold them for the seller.

The charge of the judge assumed that the title to the logs passed to the purchaser as soon as they had been delivered at the place in the river which the jury should find was the one agreed upon. Perhaps the jury may have reached this conclusion as an inference of fact from the evidence, but we cannot say that the opposite conclusion would have been unwarranted. However this may be, the question was one of fact, not of law.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

William Albrecht v. Paul Gies and others.

Evidence: Account stated. Evidence tending to show that the parties met and settled up, and that a balance was struck and agreed upon, is admissible to prove an account stated, and is sufficient to authorize the submission of the question as one of fact to the jury.

Account stated: Evidence. The admission in evidence in an action upon an account stated, of an account between the parties tending to show dealings between them, is not error where the other evidence tends to show that such dealings had been examined and a balance agreed upon; moreover the account thus admitted in evidence in this case could not have prejudiced the defendant.

Account stated: Nature of original transaction. In an action upon an account stated only, the nature of the original transaction out of which the acknowledgment of indebtedness grew is immaterial.

Rule of evidence applied alike to both parties. One at whose instance the issue has been confined to a single question cannot complain if the same rule of evidence which he has caused to be applied to his adversary is by the court afterwards applied to him likewise.

Heard January 19. Decided April 5.

Error to Wayne Circuit.

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Otto Kirchner, for plaintiff in error.

George H. Prentis, for defendants in error.

MARSTON, J:

The action in this case was assumpsit on the common counts. The plea was the general issue with notice of recoupment. Plaintiffs furnished a bill of particulars which is not printed, but it is conceded that they confined themselves therein to a recovery upon an account stated. Plaintiffs offered evidence tending to show that they had performed certain work under a contract; that the work was well done; that the materials furnished were good, and that every thing was done in accordance with the terms of the contract. This evidence was objected to by defendant's counsel, on the ground that the plaintiffs sought to recover on an account stated. The court sustained the objection and excluded the evidence. After the plaintiffs rested counsel for defendant offered to show that the work was not properly done and the damages he sustained in consequence thereof; this was objected to and excluded. The court in charging the jury confined them to the single question of a settlement between the parties, and instructed them that they had nothing to do with the question as to whether the work was well done or not; that the question submitted was whether the one thousand dollars was agreed upon absolutely and without condition.

Counsel for plaintiff in error, in this court, insist that there was no evidence of an account stated, and that the jury should have been instructed to find for the defendant. It is sufficient to say that there was evidence tending to show that the parties met, settled up, and that a balance was struck and agreed upon. That question was fairly submitted to the jury and their finding is conclusive.

It is next claimed that a certain account, exhibit H, was erroneously admitted in evidence. We think this was ad-

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missible as tending to show that there had been dealings between the parties which the other evidence in the case tended to show had been examined, and a balance agreed upon. Besides, we do not see, and counsel have not even suggested, how its admission could in any way prejudice the defendant.

There was some question as to whether at the time the settlement was made and order given on Steyskall and Brothers, it was upon condition that they had accepted the work, and the court permitted evidence to be introduced tending to show that the Steyskalls had accepted the work, and there was also evidence given tending to show that they had not. All evidence, however, as to whether the work had been properly done or not was excluded by the court, and this upon the objection, in the first instance, of counsel for defendant below, who is plaintiff in error here. It would seem that if the court below, upon defendant's counsel insisting that the plaintiffs were only entitled to recover, if at all, upon an account stated, excluded all testimony offered by them tending to show that the work had been properly done according to contract, afterwards for the same reason excluded testimony offered by defendant tending to show that the work had not been properly done according to contract, that he should not now be permitted to come here and complain of a ruling which was the legal result of the position he had taken when the plaintiffs were making their case.

At defendant's request the court ruled that the plaintiffs could only recover upon an account stated. This being so, whether the work was properly done or not was of no importance. The nature of the original transaction out of which the acknowledgment of indebtedness grew was immaterial.—*Stevens v. Tuller, 4 Mich., 388; 2 Greenleaf on E., § 127.*

There being no error, the judgment must be affirmed, with costs.

The other Justices concurred.

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John M. Hoffman v. Daniel B. Harrington and another.

Mortgages: Right of possession at common law. A mortgage in common-law form, executed prior to the statute which deprived mortgagees of the right of possession, gave the mortgagee or his assigns the right to go into the enjoyment of the lands and hold them until redeemed.

Mortgages: Right of redemption: Laches. Where no steps have been taken to redeem such a mortgage for nearly forty years after its maturity, and more than thirty after an open attempt to foreclose, it will require a very strong showing to authorize a bill to redeem.

Mortgages: Right to redeem: Right of possession. The right to redeem from such a mortgage, if outstanding, could not affect the right of possession, and could only be asserted by bill.

Irregular foreclosure: Purchaser: Right of possession. The purchaser at an irregular foreclosure obtains all the rights of the mortgagee, including, in case the mortgage was made prior to 1843, the right of possession.

Mortgages: Power of sale: Statutory provisions: Sales. The statutory provisions for foreclosure are to be treated as a part of every mortgage with a power of sale executed under the statute; and the sale under the power is a distinct exercise of authority under the terms of the contract; and while it may not be effectual to bar redemption unless in accordance with the statute, it conveys the title of the mortgagee, and that of the mortgagor subject to his redemption right.

Statutory foreclosures: Officer: Deed: Statute of 1838. The officer who conducts a statutory foreclosure sale merely stands in the shoes of the mortgagee and represents both parties; and under the statute of 1838 the power of sale continued in force as a personal power, until completed by deed, in the person who acted when the property was struck off, passing in case of his death to his representatives, and not to any official successor; and where the sale was made by the sheriff he might at the proper time lawfully execute the deed, though his term of office had in the meantime expired.

Heard January 20. Decided April 5.

Error to St. Clair Circuit.

Atkinson Bros., for plaintiff in error.

C. F. Harrington, C. R. Brown and *B. C. Farrand*, for defendants in error.

CAMPBELL, J:

Hoffman brought ejectment to recover certain lands in St. Clair county, the title to which purported to be derived

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under a mortgage foreclosure. The land was patented by the United States in 1835 to one Lucius Beach, who, in 1834, granted it by warranty deed to Jeremiah Harrington, and he in the same year (1834) conveyed it with warranty to John Kennelly. January 13, 1836, Kennelly mortgaged it to Charles Peltier for one hundred and thirty-eight dollars. November 15, 1839, Peltier began a foreclosure by advertisement, and on March 30, 1840, the land was struck off by Harmon Chamberlain, sheriff of St. Clair county, to Caleb O. Halstead, to whom Chamberlain, in 1844, after he had ceased to be sheriff, conveyed it in pursuance of the certificate. Halstead devised the property to Lucy Cain, who conveyed it to Hoffman.

The defendants claim under a deed from Lucius Beach, made in 1866, to Daniel B. Harrington, and recorded before the deed to Jeremiah Harrington; but defendants are found not to be *bona fide* purchasers without notice. The court below gave judgment for defendants, on the ground that plaintiff showed no possessory title.

The important controversy arises out of the foreclosure proceedings.

The mortgage in question, being in form a common-law mortgage, and dated many years before the statute which deprived mortgagees of the right of possession, gave Mr. Peltier or his assigns the right to go into the enjoyment of the lands and hold them until redeemed. After the time for payment had expired Peltier caused a foreclosure to be made and the property was sold to Mr. Halstead, through whom plaintiff claims.

It is not very important in this case whether the mortgage was legally foreclosed or not, except upon the question of the transfer of title. Where no steps have been taken to redeem a mortgage for nearly forty years after its maturity, and more than thirty after an open attempt to foreclose, it would require a very strong showing to authorize a bill to redeem.—*Reynolds v. Green, 10 Mich. R., 355.* And as the right to redeem, if by any chain of circum-

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stances it should be found possibly outstanding, cannot affect the right of possession, and can only be asserted by bill, it cannot take away the rights of plaintiff if he has succeeded to Peltier's title, whether legally foreclosed or not.

It was held in *Gilbert v. Cooley, Walker's Ch. R., 494,* that the purchaser at an irregular foreclosure obtains all the rights of the mortgagee. That case has always been followed in this state as a correct interpretation of the law of mortgages. But it is insisted that case merely held it to be an assignment in equity, and is no authority for legal proceedings. It was, however, held in *Dougherty v. Randall, 3 Mich. R., 581,* that the rights of any one entitled to the real ownership of a mortgage, whether transferred to him by deed or otherwise, are possessory and valid to maintain ejectment, under a mortgage made prior to 1843; and that for such a purpose an equitable assignment is sufficient. These cases dispose of the whole controversy. But it is an error to speak of such a purchase as not covering a legal transfer. If there is any thing which it does not cover it is the equitable right of redemption. And while this right has always, under our law, been regarded as practically a legal estate, the right of the mortgagee may be transferred either by a legal or by an equitable assignment or conveyance, and either will suffice.—*Niles v. Ransford, 1 Mich. R., 338.*

The power of sale in the mortgage in question empowered either the mortgagee or such person as was authorized under the statute (which is a part of every mortgage with power of sale executed under it), to make sale and conveyance on default. These powers were introduced originally to save the necessity of an equitable foreclosure, and were designed to cut off the twenty years' equity of redemption. Our statutes have imposed certain conditions before this redemption can be thus absolutely barred. But the sale under the power is a distinct exercise of authority under the terms of the contract; and while it may not be effectual to bar redemption unless in accordance with the statute, it conveys

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the title of the mortgagee, and that of the mortgagor subject to his redemption right, according to the form of the mortgage itself. The officer who sells merely stands in the shoes of the mortgagee and represents both parties.

It is claimed, however, that the deed in this case was made by a person not exercising any official powers, because not then sheriff. This objection is rested on a misapprehension of the statute applicable to the case. This mortgage was executed under "an act concerning mortgages," approved April 19, 1833. That act became a part of the contract, so far at least as to make valid any proceedings had in accordance with its provisions. It regarded the power of sale as continuing until completed by deed in the person who acted when the property was struck off, as a personal power, passing in case of his death to his representatives and not to any official successor. It is declared by section twelve that if the property sold is not redeemed "it shall be the duty of the officer or other person who shall have sold the same, or his executors, or administrators, to complete such sale by executing a deed of the premises so sold to the purchaser or purchasers." Whether under this or any subsequent statute, the sheriff's successor, as one of the persons contemplated as a possible actor under the original power, could or could not take it up where his predecessor left it, the language of the statute is entirely clear, that the deed may be lawfully made by the person selling, or his executors, whether in or out of office.

The facts found entitle the plaintiff to judgment, and the judgment for the defendants was erroneous. There seems, however, to be a difficulty without a further finding, in precisely locating some part of the premises. It will be necessary, therefore, to order a new trial.

The judgment below must be reversed, with costs, and a new trial granted.

The other Justices concurred.

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Hetty Powell v. Alonzo Conant and others; and Alonzo Conant and another v. Hetty Powell and another.

Mortgagor: Warranty deed: Outstanding title: Estoppel: Fraud: Collusion. Whether or not a mortgagor holding by warranty deed, and not ousted or disturbed, ought, in any case, for the purpose of preventing collusion, to be held estopped from setting up an outstanding title by way of defense, this rule will not apply to this case, where no fraud is shown and the equities depend on other considerations.

Mortgages: Deposits in escrow: Unauthorized delivery. Where a purchase price mortgage has been executed and deposited in escrow to await completion of title in the mortgagor in fulfillment of a verbal bargain by the mortgagee to sell the land to the mortgagor, and the title to the land in the meantime passes into other hands, the delivery of the mortgage in violation of the arrangement will not operate to make it a valid mortgage, binding upon the mortgagor.

Mortgages: Consideration: Delivery in escrow: Recall. The verbal bargain being a mere nullity, the mortgage when executed was without consideration, and the delivery in escrow, being only a conditional deposit, was at all times subject to recall before condition performed.

Land contracts: Doubtful title: Specific performance. A vendee in a land contract could not be compelled on a bill for specific performance to accept a doubtful title unless the contract so specifies.

Agency: Adverse capacity: Unauthorized acts. One employed in an adverse capacity cannot bind his principal by any thing he may do without authority prejudicial to his principal's interests.

Mortgages: Want of consideration: Deposit in escrow: Fraudulent delivery. A mortgage without consideration when executed cannot be made operative by a fraudulent delivery, without the mortgagor's acquiescence, by one with whom it had been deposited in escrow to await the completion of title in the mortgagor, in accordance with an arrangement with the mortgagee.

Submitted on briefs January 20. Decided April 5.

Appeal in Chancery from Lapeer Circuit.

W. W. Stickney, for the Powells.

W. Hemingway, for the Conants.

CAMPBELL, J:

The bill in the original suit was filed by Mrs. Powell to foreclose a purchase money mortgage for seven hundred and

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fifty dollars and interest, dated February 1st, 1872, made by Alonzo Conant and Almina J. Conant, his wife.

The suit was defended on the ground that the mortgage was executed before the conveyance from Mrs. Powell, and left in escrow with her agent until title should be made good, and then to be recorded with the deed; that before Mrs. Powell signed or executed the deed, the deed to herself not being on record, her grantor conveyed the lands to a third person, who put his deed on record at once, and thus created a cloud upon the title, and that the Conants, on discovering this, were induced to remain in possession on Mrs. Powell's behalf, and desired to rescind, and attempted to rescind, but she would not accept the rescission.

It is claimed for Mrs. Powell that a mortgagor holding by warranty deed, and not ousted or disturbed, cannot set up an outstanding title by way of defense, but must rely on the covenants.

If this is true, it must be because the party purchasing has seen fit to accept a title, which he was not bound to accept without examination, and has thereby obtained advantages which he cannot equitably refuse to pay for. Usually, perhaps, the cases may justify the enforcement of such a rule, as desirable to prevent collusion. It is not necessary for us to consider how far it should be applied, as the present case is so peculiar as to fall beyond any such rule if it exists.

There is no reason to suspect fraud on either side, and the equities depend on other considerations. It is necessary therefore to consider the situation of the parties.

The complainant, Mrs. Hetty Powell, received a conveyance of the premises in question from one Noah A. Bruce (to whom Conant had formerly sold it), on the 30th of January, 1872. This deed she failed to record until March 11th, 1872.

Two days after the date of this deed, and on the first of February, 1872, Conant and wife made the mortgage in suit, acknowledged it, and delivered it to Joseph Powell, a son of

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complainant, to be kept until Mrs. Powell should make title to Conant, and then recorded.

Thomas Powell and his brother Joseph Powell, on the first day of February, professing to act on their mother's behalf, made a verbal bargain to sell the land to Conant, and a deed was drawn up at the same time with the mortgage, but not signed, and both papers were taken by Joseph Powell to be held until Mrs. Powell, who was then out of the state, should execute the deed, and then recorded, as before mentioned. On the 5th of February, Noah Bruce deeded to his father, John O. Bruce, and that deed was at once recorded. No further communication was had with Mr. Conant, until after the deed and mortgage were recorded on the 11th of March. Conant knew nothing of the record or completion of the title until he also learned at the same time of the deed to John O. Bruce. He at once objected, and was induced to continue in possession on an understanding that steps would be taken to cancel Bruce's title by proper legal proceedings, and after considerable delay, he tendered a release and quit-claim, which complainant's agent refused to accept.

It will be observed that Conant never dealt with Mrs. Powell in person, nor with any one competent to bind her under the statute of frauds. The verbal bargain was a mere nullity, and the mortgage when executed was without foundation or consideration, and moreover there was no title in Conant to mortgage. Its delivery, whatever may have been the language of the parties, could not have been a present delivery of a present contract, but a conditional deposit of a paper to be delivered in future in case a contract was made in future. It was at all times subject to recall.

Whether any agreement or understanding was expressed in words or not, there can be no doubt a good title was expected, and on that day a good title could have been made. If the agreement had been in writing, that Mrs. Powell would convey to Conant, and that the latter would give back

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a purchase money mortgage, Conant could not have been compelled, on a bill for specific performance, to accept a doubtful title, and no agreement would be enforced which should require such acceptance unless specially bargained for.

When Mrs. Powell made her deed she had no contract rights against Conant, and she had, by her own negligence, allowed her title to become clouded. Nothing but an intelligent acceptance of a clouded title could have bound Conant. He never accepted, nor had he ever authorized Joseph Powell to accept for him any such title. He had never made Joseph his agent under the statute of frauds for any purpose, unless the deposit created an escrow of such a nature as to give Mrs. Powell greater rights than she would have had by an express written contract, which would certainly have bound her to convey a good record title.

Conant never ratified this transaction. He objected at the outset, and all the subsequent course of the parties was understood to be conditional. The deed was recorded without having been accepted, and he cannot be made worse off by Joseph Powell's unauthorized act. The latter, who was really employed in an adverse capacity, would not have been permitted to do any thing prejudicial to Conant and thereby bind him. But it is not in evidence that he knew of the Bruce deed when he recorded the others. If he had, it would have been a fraud on Conant to put his mortgage on record without informing him of the changed condition of the title.

The mortgage, as we are satisfied, never was and never would have been delivered to Mrs. Powell by Conant if he had known how the title stood; and was not his act in any proper equitable or legal sense. It was void as a mortgage at its date, and never received vitality by Conant's intelligent acquiescence.

The case is therefore entirely different from the ordinary case of a mortgage delivered by the party on the acceptance

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of a conveyance. This mortgage was never operative at all.

The decree must be reversed, with costs of both courts. The original bill must be dismissed, and a decree entered on the cross-bill, requiring the mortgage and securities to be canceled and delivered up, on the release by Conant and wife to Mrs. Powell of their apparent interest in the lands in controversy.

The other Justices concurred.

Herman Hebel v. The Amazon Insurance Company of Cincinnati.

Garnishee proceedings: Service of process: Compulsory novation. It is essential in order to bind the creditor whose claim is sought to be appropriated by means of garnishee proceedings, that there be service of process or its equivalent, and he will not be bound by an independent and spontaneous submission of his rights by his debtor. The intervention of the law according to its own substantial appointments can alone initiate compulsory novation.

Vicarious service of process: Special relation to party. And where the service must be vicarious and it can lawfully be made only on some one standing in a special relation to the party sought to be served, the existence of such special relation is just as indispensable as, in ordinary cases, is the identity of the person served, with the defendant.

Garnishee proceedings: Service of process: Waiver: Principal defendant. The bringing the right into the custody of the law by the application of process against some one competent to receive service, cannot be waived by the intended garnishee as against the principal defendant, and so as to bind him.

Acceptance of service: Agency: Proof of service. An endorsement of acceptance of service on behalf of a foreign corporation by parties who therein describe themselves as agents of the corporation, has no legal force by itself as evidence of the fact of such agency, or as proof of such service as the law contemplates.

Garnishee process: Justice's courts: Service: Acceptance: County. Service of garnishee process from justice's courts cannot under the statute (*Comp. L. 1871, § 6463*) be made beyond the county; and an acceptance of service which shows that it was made outside the county thereby shows that it was made where the process had no legal force.

Jurisdiction over persons: Exceptional methods: Vicarious service. All excep-

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tional methods of obtaining jurisdiction over persons, natural or artificial, not found within the state, must be confined to the cases and exercised in the way precisely indicated by the statute.

Submitted on briefs January 20. Decided April 5.

Error to Superior Court of Detroit.

Kane & Hibbard, for plaintiff in error.

Moore & Griffin, for defendant in error.

GRAVES, J:

The plaintiff claimed as assignee of one Adolph Hebel to recover ten hundred and thirteen dollars for a fire loss in 1872 suffered by the assignor, and which was covered by a policy issued to the latter by the defendant, a corporation of Ohio doing business here. The company defended on the ground that previous to the assignment to the plaintiff, and after the loss, certain creditors of the assignor commenced two garnishee suits against the company, one before a justice of the peace of Detroit and the other in the Wayne circuit court, based on the demand existing under the policy on account of said loss; that final judgment had passed against the company in both cases, and that the aggregate amount was equal to the whole sum claimed in this suit. And the company insisted that such proceedings afforded a complete answer to the plaintiff's action; that they amounted to a lawful adjudication that the liability on the policy was exclusively due to the garnishee plaintiffs, and not to the assured, and of course not to the plaintiff, who stands in his shoes. When the case came to be submitted to the jury the judge directed a verdict for the company. The only question there is depends on the validity of the defense as the record shows it. Several points commented on by counsel require no discussion. Concerning the theory of the defense there is no difficulty. The question is, whether, as we see the record, there were facts to support the theory. It will be noticed at the outset that the action is by the

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assignee to enforce against the company the very obligation it directly incurred by contract with the assured, and that in substance the defense made by the company is, that prior to this suit, and previous to the assignment by the assured, the right to this same obligation was ousted from the ownership of the assured and vested in third persons by proceedings on the part of those persons against the company under the garnishee law. It is material to distinguish between the attitude of these parties and this controversy, and the state of things when the garnishor and garnishee are contending about the consequences and results of garnishee proceedings which have taken place between them. Many things may take place in the course of such proceedings which the garnishee, on the one hand, or the garnishor, on the other, may be bound or estopped by, as between themselves, but which the garnishee may not be able to urge as matter of defense against the suit of the principal defendant. Still there is no question of the right of one prosecuted as garnishee to make many admissions and waivers without endangering his protection. He need not wait to be led by the shoulder into court. He need not wage battle at every step. The law itself not only recognizes his right to suffer default, but provides what the practice shall be in such case, and invests the judgment with the same protective force as it does one awarded after vigorous contest. Still the proceeding must have a beginning agreeable to its nature, in order to hold the principal defendant, and the nature of the proceeding requires that the law shall be brought to bear directly against the right of the principal defendant in the hands or under the control of the garnishee, and the mode, and the only one, provided for this is by service of the process on, or submission to service by, some one competent in law to receive service. The law itself must be caused to attach, and it can be effected in no other way. Independent and spontaneous submission by the custodian or debtor of the right belonging to the principal defendant cannot bind him. The intervention of the law,

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according to its own substantial appointments, can alone initiate compulsory novation. A garnishee may admit away his own right over which he has power, but he cannot admit away another's right over which he has no power. It is a plain proposition that one against whom there is an existing claim cannot by his own act alone transfer it into an obligation to another. The right itself and the power to enforce it must remain in the original owner unless there is a novation by his consent or by force of legal proceedings, and where the end is sought through the garnishee law and depends on no assent or acquiescence of the principal defendant, the right must be taken into legal custody and subjected by course of law, and as against the principal defendant this cannot be accomplished by the *ex parte* action of the debtor or custodian of the right, even on the request of the garnishor, though made in the form of complaint filed and process sent out. There must be action under process which brings home to the garnishee, and the right to be subjected, the power of the law itself. In ordinary cases there is no difficulty, because the identical party being exposed to service is actually served. The case is different where the service must be vicarious, where it can be made only on some one standing in a special relation to the intended garnishee. In such case the existence of such special relation is just as indispensable in order to cause the law to attach and bind the principal defendant as is the identity of the garnishee with the person actually served in ordinary cases. If the relation appointed by law as a condition of valid service, as something to make the supposed service binding, does not exist, the law does not attach to the right, and the principal defendant is not bound, and if the intended garnishee assumes thereafter to step in and treat it as service upon or against him and against the right in question, whatever may be the consequence as between him and the party prosecuting as garnishor, such action cannot bind the right as against the principal defendant. The right has never been attached, and the action of the

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custodian or debtor of the right is in its nature merely voluntary. The bringing the right into the custody of the law by the application of process against some one competent to receive service cannot be waived by the intended garnishee as against the principal defendant. The step is one which lies at the foundation of the proceeding and is the basis of the protection of the intended garnishee against the urging of a claim by the principal defendant. The nature of the thing repels a fictitious service. The process must be served upon the very party, or it must apply against some one standing in point of law for the purpose of service in the place of the very party. Were it not so, were it not necessary to appear that the service has been on the identical party, or in case of vicarious service been caused to apply against some one competent in law to receive service on account of the identical party, this fundamental step would become as easy and unreal as was formerly the vouching to warranty in a common recovery. There the vouchee was usually the court crier. As already intimated, the ability of a party to bind himself by acquiescence or voluntary appearance is unquestioned. But the right of the principal defendant can only be bound against his consent when a real service is effected in some form by which his right is attached. In view of the foregoing considerations, were the garnishee proceedings, as they are represented in the record, sufficient to bind the right of Adolph Hebel, the principal defendant, and preclude him or his assignee from recovering on the policy?

The material inquiry is, whether the steps which were taken in regard to service of garnishee process were adequate to bind Hebel, and enable the company to contend as against him that his right was subjected to the power of the garnishee law.

The steps in question appear affirmatively in the record.

The insurance company, as previously stated, is an Ohio corporation. It has never been in this state. The garnishee process in the circuit court was issued on the 18th of De-

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cember, 1872, and it required the company to appear and disclose on the 7th of January following; and one John F. Murray, purporting to act as agent, made disclosure more than a month afterwards, namely, on the 18th of February. No return by an officer was made on the process, but the following endorsement was made on it of the same date as the writ:

"We do hereby accept service of the within writ of garnishment, as agents of the Amazon Insurance Company of Cincinnati. Schmemann and Kuhn." There was no other evidence of service in the case.

The garnishee law applicable to circuit courts (*L. 1861, p. 559*) provides that "any corporation, domestic or foreign, other than municipal, may be garnished."—§ *30*. And particular provisions are introduced to regulate the mode of service in case of domestic corporations and natural persons, but the law is silent on the subject so far as foreign corporations are concerned. It is therefore necessary to look elsewhere for provisions applicable to them. As the case was commenced before the act of 1873 (*L. 1873, p. 206*), that law could not have applied. The only provision applicable to the circuit courts, and then existing, would seem to have been *section one of ch. 45, C. L.* And it is this provision that counsel rely upon. It is there provided that each foreign insurance company shall file a resolution with the secretary of state; that such resolution shall be under the company seal, and be signed by the president, secretary or other chief officer; that it shall convey authority to each agent the company appointed by resolution under the company seal, to acknowledge service of process for and on behalf of the company; that it shall contain consent that the service of process on any agent shall be taken and held to be as valid as if served on the company according to the laws of Michigan, or of any other state; and that it shall waive all claim of error by reason of such service. Having thus required the filing of a resolution by the company, and having prescribed its contents, the law proceeds to declare, that suits may be commenced against any such

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company in any county in this state by declaration or process as in other cases, and that such declaration or process may run into and be served on any such agent or attorney in any county in this state where such agent or attorney may be.

Now it is quite plain that if the statement of Schmemann and Kuhn indorsed on the writ had legal force for any purpose, it had none whatever as evidence to the circuit court of the service of process under the law in question, so as to bind Hebel's rights, as between him and the company. The court could not take judicial notice, if such was the case, that a resolution was on file in the secretary of state's office, or that Schmemann and Kuhn were agents appointed under seal, or were agents at all, and their statement that they were agents, could neither make nor prove them such.

Their unsworn statement was of no more legal value to establish service than the like statement by any body else would have been.

There was positively no evidence before the court that Hebel's right had been attached, and no basis for proceedings taken upon the theory that it had been, and even now it does not appear in any way that Schmemann and Kuhn were competent to receive binding service.

It would be strange if a man's legal right were subject to be cut off or barred by such practice. The circuit court before going on should have had evidence before it to prove that its process had taken effect against the company, and had brought Hebel's right under the power of the garnishee law.

This was not done, and the record shows that the court went on without any authority as against Hebel.

In the second case the justice at Detroit issued his process on the seventh of March, directed to any constable of Wayne county, and commanding that the company be summoned to appear before the justice at his office in Detroit, and make disclosure on the 19th of the same month. There was no official return of service at all, and nothing on the

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subject except an indorsement on the writ as follows: "I hereby accept service of the within process, at Grand Rapids, March 8th, 1873. E. G. Holden, state attorney, Amazon Insurance Co."

There was no disclosure at all before the justice. The paper submitted to the justice as disclosure was made and sworn to at Grand Rapids. The garnishment act applicable to justice's courts makes foreign corporations, other than municipal, subject to be garnished, and directs upon whom service may be made (§ *6463, C. L.*), but there is nothing in the act which directly or by implication authorizes service beyond the bounds of the county, and the insurance company act, previously noticed, cannot be construed as intended to authorize a justice to send his process into any county in the state.—*Hartford Fire Insurance Co. v. Owen, 30 Mich., 441.* If Mr. Holden's statement on the process showed any thing in the nature of a service regular in form, it showed at the same time that it occurred where the process was without legal force.

After the discussion which has been had, it would be a waste of time to explain all the defects in this proceeding.

That there was no evidence before the justice of any service of his process binding on Hebel or his right, and no foundation for an adjudication against him, is plain. It was observed in *Hartford Fire Ins. Co. v. Owen, supra,* that "it is a settled rule of law that all exceptional methods of obtaining jurisdiction over persons, natural or artificial, not found within the state, must be confined to the cases and exercised in the way precisely indicated by statute;" and the remark is strictly in point in regard to both the proceedings on which the defense in this case is based.

I am of opinion that neither of the garnishee cases afforded any defense, and that the court below erred in holding otherwise.

Judgment reversed, with costs, and a new trial ordered.

The other Justices concurred.

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Joseph F. Lobdell and others v. The Merchants' and Manufacturers' Bank of Detroit.

Declaration: Promissory notes: General issue: Execution: Admission. In an action upon a promissory note, against makers and endorsers, the general issue, unaccompanied by an affidavit denying the execution of the note, under our practice is an admission by each defendant that he signed the instrument as alleged in the declaration, and also that it was executed by the parties declared against.

Promissory notes: General issue: Admission: Partners: Signature. And this admission covers the fact of execution by the defendants by the name and description alleged in the declaration, and does away with any necessity of proving partnership between persons signing in a firm name, and charged as partners.

Promissory notes: Holder for collection: Suit in his own name. A bank holding a note as collateral security may, with the assent of the owner, sue upon it in its own name.

Practice: Documentary evidence: General objection. An objection to the admission of documentary evidence, which fails to state the particular grounds of incompetency, is too general to raise any question for review.

Submitted on briefs January 21. Decided April 5.

Error to Superior Court of Detroit.

This action was brought by the bank in its own name upon a promissory note held by it as collateral security, and at the request of the owner thereof. The cause was tried by the court without a jury, and judgment was rendered for the plaintiff. Defendants bring error.

Brennan and Donnelly, for plaintiffs in error.

George E. Wasey, for defendant in error.

MARSTON, J:

In this case it is claimed that the note sued upon has been paid so far as plaintiff in error is concerned. It is a sufficient answer to this to say that the court below has not so found, nor does such a conclusion follow from the facts found.

It is claimed that the court erred in admitting in evi-

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dence the promissory note sued upon, without proof of the endorsements or signatures of the endorsers. The suit was brought against the makers and all the endorsers but one, and his endorsement was admitted to be genuine. The execution of the note and endorsements were not questioned in the pleadings. Where the action, as in this case, is brought against the makers and endorsers, under the plea of the general issue each defendant thereby admits that he signed the instrument as alleged in the declaration, and also that it was executed by the parties declared against.—*Pegg v. Bidleman, 5 Mich., 29.*

It was also claimed that there was no proof offered showing any co-partnership between defendants Lobdell and Stevens as alleged in the declaration. No such proof was necessary. The admission of the execution was an admission that it was executed by the defendants by the name and description alleged in the declaration.—*Pegg v. Bidleman, supra.*

It is also claimed that the plaintiff had no right to sue this note in its own name and for its own benefit. Under the finding of the court we think it had the right to sue and collect in its own name.—*Brigham v. Gurney, 1 Mich., 349.*

The only other objection made in this court is to the admission of the duplicate notices of protest in evidence. The record states when these notices were offered that the "defendant's counsel objected." It does not appear that any particular objection or reason was given why they were incompetent. The objection was too general. The particular ground of their incompetency should have been pointed out so that the party offering them might have had an opportunity to supply the defect if in his power so to do.

The judgment must be affirmed, with costs.

The other Justices concurred.

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Charles H. Smith v. Merlin C. Osborn and another.

Mortgages: Fraud: Deceit: Husband and wife. Where a husband, after soliciting and obtaining the consent of his wife to the mortgaging of her property to secure the purchase price of goods then presently to be sold and delivered to him, presented to her, though without any false representations, and procured her to execute a mortgage covering also an old indebtedness of his, of which she was not informed, in addition to such purchase price, the mortgage was held void as to the prior indebtedness for the fraud, but valid as to the residue thereof.

Equity pleading and practice: Foreclosure bill: Installments: Decree. Upon a bill filed to foreclose a mortgage payable in installments at a time when only one installment had become due and remained unpaid, and which seeks a foreclosure for that payment only, a decree covering in addition thereto other installments not yet due when the bill was filed, is unwarranted.

Fraud: Innocent parties: Superior equities: Prior indebtedness. One who has innocently received from a husband, to secure the purchase price of goods then presently sold and delivered to him, and also a prior indebtedness of his, a mortgage executed by his wife upon her own property, which, as to such prior indebtedness, was a fraud upon her, cannot claim to have equities superior to hers so long as the avoiding of the mortgage to the extent of such old indebtedness will not place him in any worse position than he originally occupied.

Heard January 21. Decided April 5.

Appeal in Chancery from Saginaw Circuit.

Wisner & Draper, for complainant, to the point that the complainant ought not to be prejudiced by any fraud practiced by one defendant upon another, in the absence of any showing that he was privy to it or took part in it, cited: *McWilliams v. Mason, 31 N. Y., 294; Stowe v. Compton, 35 E. C. L., 93; Durfee v. McClary, 6 Mich., 232; 2 Pars. on Cont., 8, note s.*

Thompson & Tarsney, for defendant Emeline C. Osborn.

The defendant, Emeline C. Osborn, having given a mortgage to secure her husband's debt, is a surety.—*Denison v. Gibson, 24 Mich., 187; 3 Leading Cases in Eq., 580-591.*

She was entitled, at the time she entered into the con-

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tract of suretyship, to a full, fair and explicit statement of all facts and circumstances which might naturally have the effect to increase her liability as such surety, and the suppression of any such material fact or circumstance will relieve her from all liability whatever.—*Denison v. Gibson, 24 Mich., 187; Piddock v. Bishop, 3 B. C., 605; Jackson v. Duchare, 3 T. R., 552; Steinman v. Mayners, 11 East, 390; Weed v. Beatty, 6 Hill, 56; 3 Leading Cases in Eq., 355; Story's Eq. Jur., §§ 214, 215, 216, 217, 218; Willard's Eq., 147-151; 2 Am. L. Cas., 316.*

Complainant Smith took this mortgage as collateral security to a pre-existing debt, and is not a holder for value, and any defense that could be made to this mortgage in the hands of Osborn, or a party to the fraud, can be made to it in his hands. This rule applies even to negotiable paper.—*1 Parsons on Con., 258, and note a, and cases cited.* Courts have gone so far as to hold that no party, however innocent, can profit by a fraud.—*Kerr on Mistake and Fraud, 51; Huguenon, v. Basely, 14 Ves., 289; Burns v. Johnson, 18 Miss., 169; Jones v. Emery, 40 N. H., 348; Lawrence v. Hand, 23 Miss., 103; 3 Iredell Eq. R., 219.*

We submit that in securing this mortgage, Osborn acted as the agent of Smith. The mortgage was obtained at Smith's request and for his benefit.

COOLEY, CH. J:

The consideration of the mortgage which is in controversy in this suit was the purchase price of certain goods bought by Merlin C. Osborn of complainant, and also an old indebtedness of a few hundred dollars owing by him to complainant. The mortgage is upon property owned by Emeline C. Osborn, who is the wife of the other defendant, and was given by her at her husband's request. She defends the foreclosure, claiming to have been defrauded when her signature was obtained.

The alleged fraud consisted in the husband soliciting and

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obtaining the consent of the wife to the mortgaging of her property to secure the purchase price of the goods, and then, without her knowledge, making it cover the old indebtedness also. No false representation is alleged, but there was deception in presenting and obtaining the execution of a mortgage which differed from what was agreed; and this deception, it is insisted, was a fraud which entitles Mrs. Osborn to avoid the mortgage.

The claim of the defense cannot be sustained to the full extent. So far as the security was agreed upon by Mrs. Osborn it must be supported. To that extent there was no fraud on the part of any one; and as the husband has had the benefit of the arrangement, whatever it was, all the equities are in favor of enforcing the mortgage so far as it was fair and just. Mrs. Osborn has all the relief she is entitled to if she is relieved of that portion of the sum included in the mortgage which it was wrongfully made to cover.

The bill appears to have been filed to foreclose the mortgage on the second payment for the purchase price of the goods falling due, and it seeks a foreclosure for that payment only. The old indebtedness was represented by a note falling due subsequently, and there were also two subsequent payments to fall due on the purchase of the goods. The allegations of the bill covered none of these, and no issue was made concerning them. Nevertheless the decree for complainant has been made to cover all of them. This was manifest error, and probably the decree was made through inadvertence.

On the case as it stands on the evidence, the complainant would not have been entitled to a decree for so much of the sum specified in the mortgage as constituted the old indebtedness. Mrs. Osborn, having been to this extent defrauded in the giving of the mortgage, is entitled to avoid it unless it can be sustained on the ground that her negligence in carelessly executing a mortgage without examination has enabled her husband to make use of it with a

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person who has taken it in good faith, and who will now be defrauded if it is not enforced. As thus presented, the question will be whether Mrs. Osborn or the complainant, both being equally innocent, must suffer for Mr. Osborn's fraud; and it is said she should suffer because her negligence enabled the fraud to be committed. But to make this argument available it must appear that complainant, so far as the old indebtedness was concerned, has done something, or parted with something in reliance upon the mortgage, which will make defeating the mortgage as security to that extent operate to his injury. Nothing of the kind appears here; and this fact distinguishes the case broadly from *McWilliams v. Mason, 31 N. Y., 294*, on which complainant relies.

The decree must be modified so as to confine it to the installment which was put in issue, and Mrs. Osborn must recover the costs of this court.

The other Justices concurred.

The People on the relation of Eugene Carpenter v. The Wayland Wood Manufacturing Company.

Corporations: Information in nature of a quo warranto: Forfeiture: Non-user: Judgment creditors: Statutory remedy. An application by a judgment creditor for leave to file an information in the nature of a *quo warranto* to enforce a forfeiture for non-user of the corporate rights and franchises of a manufacturing company, is denied in the absence of any showing that the statutory remedy provided for judgment creditors, and which is deemed the more appropriate one, was not available.

Heard April 4. Decided April 5.

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James Blair and another v. Benjamin S. Compton.

Practice: Divided court: Affirmance. In this case, which is *certiorari* to review an order of the circuit judge setting aside upon motion an execution levy and sale, the supreme court being equally divided, the order is affirmed under the statute.

Execution sales: Motion to set aside levy or sale: Showing by affidavit. The circuit courts have authority, as between the parties to a cause pending therein, to set aside upon motion for any illegality appearing therein a levy or sale by virtue of an execution issued by such court; and in case of an excessive levy or of a sale for an inadequate price, they may upon motion set aside the levy or sale; and the facts, if not appearing on the face of the papers, may properly be shown by affidavit. Every court controls its own process, and will prevent an abuse of the same, if its attention is seasonably called thereto upon motion.—Per MARSTON, J., COOLEY, CH. J., concurring.

Motions: Hearing before judge at chambers: Appearance: Waiver. Where counsel have appeared and consented to the hearing of a motion before the circuit judge at chambers, and have there appeared and opposed the motion upon its merits, making no objection to the jurisdiction, they will not be permitted, after having been beaten on the merits, to make in the court of review a technical objection to the right of the judge to hear and determine the motion at chambers.—Per MARSTON, J., COOLEY., CH. J., concurring.

Motion to set aside execution sale: Purchaser: Appearance: Waiver. The purchaser at a judicial sale must be considered as having submitted himself thereby to the jurisdiction of the court as to all matters connected therewith; and when he has notice of a motion to set aside the sale, and in answer thereto appears and without objection goes to a hearing on the merits, he is not in a position to afterwards object to the power of the court to decide such motion.—Per MARSTON, J., COOLEY, CH. J., concurring.

Execution sales: Corporate shares: Statute must be complied with. Corporate shares were not at common law subject to levy and sale under execution, and statutes authorizing it must be substantially complied with, or the sale will be unauthorized and void.—Per MARSTON, J., COOLEY, CH. J., concurring.

Executions: Levy: Return day: Officer: Service begun: Completion. A levy made after the return day of the writ, or after the expiration of the official term of the officer, will render a sale thereunder void; but where the officer, before the return day and during his official term, has commenced the execution of the writ, he may, even without the aid of statutory provisions, complete it afterwards, though his term have in the meantime expired; the statutes in this regard are but declaratory of the common law.—Per MARSTON, J., COOLEY, CH. J., concurring.

Executions: Official duties: Presumptions. The statutory requirements regulating proceedings upon execution are duties which the ministerial officer of the court executing its process is required to perform; and all reasonable presumptions are to be indulged in favor of the regularity of the acts of the officer.—Per MARSTON, J., COOLEY, CH. J., concurring.

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BLAIR *v.* COMPTON.

Executions: Corporate shares: Service: Statute construed. Under the statute (*Comp. L.*, § *6113*) providing means for taking and selling on execution the shares or interests of a stockholder in a corporation, the right to serve the copy as therein provided upon "any officer or person who has at the time the custody of the books and papers of the corporation," is not to be confined alone to the case where there is no such officer of the company as "clerk, treasurer, or cashier;" but where the sheriff of the proper county where the office of the company within this state for the transaction of business is located, certifies that there is no clerk, treasurer or cashier within his bailiwick, he may then lawfully serve a copy upon any officer or person who has at the time the custody of the books and papers of the corporation.—Per MARSTON, J., COOLEY, CH. J., concurring.

Executions: Service: Return: Place: Presumptions. A return of service of such copy upon "Wm. M. Smith, in charge of the office of the company," sufficiently indicates that such office was within the bailiwick of the officer certifying to such service, as it will not be presumed that the sheriff went outside his county to make service.—Per MARSTON, J., COOLEY, CH, J., concurring.

Executions: Certificate of service: Information. A certificate of service "upon the following persons, who I was informed had the custody of the books and papers of the said company, William H. Boyd, deputy secretary or clerk of said company, William M. Smith, in charge of the office of the company, and Benjamin S. Compton, president of the company," is held to be a sufficient return of service upon "the officer or person who had at the time the custody of the books and papers."—Per MARSTON, J., COOLEY, CH. J., concurring.

Executions: Levy: Officer: Commencement of service: Attempt to levy. However it may have been at common law, under our statutes the levy of an execution need not be complete or perfect on or before the return day, in order to entitle the officer to proceed afterwards, but where an officer has in good faith begun the service by an attempt to levy upon property, that is sufficient.—Per MARSTON, J., COOLEY, CH. J., concurring.

Corporate shares: Execution levy: Ascertaining from corporate officer the number of shares. A compliance with the provisions of the statute (§ *6114*), as to ascertaining from the officer appointed by the corporation to keep the record thereof, the number of shares subjected to the levy by the service of the required notice, is not absolutely necessary to a valid execution sale, provided the sheriff ascertains from any source the actual number of shares owned by the judgment debtor, and puts them up and makes sale thereof.—Per MARSTON, J., COOLEY, CH. J., concurring.

Execution sales: Notice: Corporate shares: Sales in bulk: Indefinite amount. An execution sale, under a notice describing the property as all the stock of a named corporation standing in the defendant's name on the books of the company or legally or equitably owned by him on specified days, the precise number of shares being unknown, but estimated to be 11,000 shares, where the amount at the sale was represented to be at least 4,162 shares, is sustained as against the objections of the judgment debtor, the purchaser making no complaint, as a valid sale to the extent of the 4,162 shares, but is held void as to the excess.—Per MARSTON, J., COOLEY, CH. J., concurring.

Execution sales: Personal property: Corporate shares: Entire interest. The rules applicable to the sales of personal property on execution do not apply to sales under the statute of shares in a corporation; and a sale in bulk of the defendant's entire interest is not void, though it might in a proper case on motion be set aside.—Per MARSTON, J., COOLEY, CH. J., concurring.

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BLAIR *v.* COMPTON.

Execution sales: Motion to set aside sale: Inadequacy of price: Strong showing. To authorize the setting aside of an execution sale of stocks on the ground of inadequacy of price in consequence of the sale being in bulk of the defendant's whole interest, a very clear case should be made out; a creditor ought not to be delayed in the collection of his debt until the property of his debtor will sell for the price his neighbors may fix upon it, or until it can be sold for as much as might be obtained at private sale under favorable circumstances.—Per MARSTON, J., COOLEY, CH. J., concurring.

Motions to set aside execution sales: Review: Certiorari: Discretion. Motions to set aside execution sales are admissible; and the order of the circuit court upon such a motion ought not to be reviewed on *certiorari* upon questions going only to the propriety of the order and where the authority to hear and determine the matter upon the papers submitted is undisputed.—Per CAMPBELL, J.

Sheriff's return may be disputed. A sheriff's return may be disputed by the parties over whose interests he has attempted to declare evidence of jurisdiction.—Per CAMPBELL, J.

Motions to set aside execution sales: Review: Ground of decision: Record. Where a motion to set aside an execution sale has been heard and granted upon a showing disputing the essential facts of service alleged in the sheriff's return, this action cannot be reviewed on such return alone considered as true, where the record fails to show that the ground of decision may not have been these very disputed questions of fact as to the service.—Per CAMPBELL, J.

Execution sales: Personal property: Production of the property: Identification. A sale of personal property upon execution is not valid, either at common law or under our practice, unless the property is produced at the place of sale and within the view of the bidders, in the actual control of the officer, and present for identification and delivery.—Per CAMPBELL, J.

Corporate shares: Execution levy and sale: Construction of statute. The statutory regulations as to levying upon and selling stock under executions must be read and applied in the light of the rules of corporate law.—Per CAMPBELL, J.

Execution sales: Corporate interests: Legal title: Equitable interests. The corporate interests which under the statute can be levied on and sold under execution are only such legal interests as appear on the corporation records as shares belonging to the judgment debtor; and no levy can cover either interests subsequently acquired or mere equitable interests.—Per CAMPBELL, J.

Executions: Levy: Stock: Sales: Identification of shares. While a levy served according to the statute may bind the property, yet before a lawful sale can be made the stock must be in some way obtained and identified and in shape for delivery; the difficulty of finding property will not justify a sale of it at random and out of sight.—Per CAMPBELL, J.

Stock: Execution sales: Amounts: Notice. Execution sales of stock should be in amounts within the reach of ordinary purchasers; and a sale under a notice advertising all stock standing in the debtor's name "or legally or equitably owned by him" on two specified dates, the precise amount being unknown but estimated at 11,000 shares of the nominal value of fifty dollars a share, cannot be sustained.—Per CAMPBELL, J.

Execution sales: Amounts: Notice: Representations at sale. The fact that at the sale under such a notice it was represented that the amount was at least 4,162 shares, without identifying them or stating the title to be a

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legal title,—the notice not so averring it,—does not cure the defects.—Per CAMPBELL, J.

Execution sales: Purchaser: Rights of debtor: Competition: Bidders. Nor is it enough that the actual purchaser is satisfied; the debtor has a right to have a chance for fair competition, and bidders have a right to expect the sheriff to be furnished with some evidence which binds the company by a statement of the amount of stock and ensures them the enjoyment of what they bid upon.—Per CAMPBELL, J.

Executions: Bail in error: Stay: Completed levy: Sales. Under our statutory regulations governing stay of execution by bail in error, the stay does not dissolve or vitiate a completed levy on personalty under an outstanding execution, and it is lawful for the sheriff, unless otherwise directed by the court, to proceed and sell property which had previously been completely subjected to levy, and return the proceeds into court.—Per GRAVES, J.

Executions: Stay: Bail in error: Attempt to levy: Beginning of execution. But where the stay became operative before levy on any thing was consummated, or any thing done beyond a mere movement towards a levy, or an ineffectual attempt to levy, these preliminary steps do not constitute a proceeding capable of independent existence as a legal fact as a beginning of execution, such as to survive the stay, and after its cessation to be pieced out by further proceedings to a valid levy relating back to the original action.—Per GRAVES, J.

Executions: Beginning of service: Corporate shares: Bail in error: Stay: Subsequent proceedings. The mere preliminary service, in accordance with the statute (*Comp. L. 1871, §§ 6112-3*) governing levies upon shares of stock, of a copy of the execution upon persons in charge of the company books and papers, is not sufficient to make out either a consummated levy or the beginning of execution of the process, such as would survive the stay of bail in error or contribute any force to further proceedings taken after the stay had ceased.—Per GRAVES, J.

Heard November 3. Decided April 11.

Certiorari to Circuit Judge of Monroe Circuit.

Norris, Blair & Stone, for plaintiffs in *certiorari*, to the question of jurisdiction, cited: *McLean County Bank v. Flagg, 31 Ill., 290; Eckstein v. Calderwood, 34 Cal., 660; Day v. Graham, 6 Ill., 435, 453; 9 Ill., 389; Osborn v. Claud, 21 Iowa, 238; Nelson v. Brown, 23 Mo., 19; Reed v. Diven, 7 Ind., 189; Davis v. Campbell, 12 Ind., 192; Draine v. Smelser, 15 Ala., 423; James v. P. & C. R. R. Co., 23 N. H., 544; Shafer v. Bolander, 4 Greene, 201; Woodcock v. Bennett, 1 Cow., 711; McElwee v. Sutton, 2 Bailey (S. C.), 361; Hamilton v. Shrewsbury, 4 Rand. (Va.), 431; Newton's Heirs v. State Bank, 22 Ark., 21; May v. Thomas,*

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48 Me., 398; Stewart v. Severance, 43 Mo., 323; King v. Platt, 37 N. Y., 160; Swope v. Ardery, 5 Ind., 215; Wheatley v. Terry, 6 Kans., 427; C. L. § 4966; 21 Mich., 242.

They also argued that the levy was regular, the officer having on November 29, 1872, before the stay of bail in error had become operative, done all in his power to make it so, and having substantially complied with the statute; and, moreover, that defendant Compton is estopped to deny the validity of the levy.

And the sale under the execution was regular, and if not, the defendant is estopped to question it as against the purchaser.

S. T. Douglass, for defendant in *certiorari,* insisted that both levy and sale were void, and that their invalidity appears on the face of the sheriff's return.

Corporate shares are not subject to levy and sale on execution at common law: *Rorer on Jud. Sales,* §§ *1002–3; Haggerty v. Wilber, 16 Johns., 287; Carey v. Bright, 58 Penn. St., 70.*

Our statute providing for the seizure and sale of such shares is designed to protect the corporation, and also to furnish to the debtor the same safeguard against oppression which the common law furnishes in case of other personal property, and its provisions must be substantially complied with or the proceedings will be void: *C. L.,* §§ *6113–16; Rorer,* §§ *1073–4, and note 2.*

The levy was void because (1) the return does not show service upon either the clerk, treasurer or cashier of the corporation, or that there was no such officer, in which event alone is substituted service on some other person admissible; (2) the return does not show service upon any other officer or person who "had at the time the custody of the books and papers of the corporation," but only that it was made on three persons named, who the sheriff "was informed" had such custody. The attempt

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to remedy this defect by a new service several months after the return day of the execution is of no avail.

The sale was void because (1) the sheriff had not first ascertained, in the manner provided by the statute (*C. L.*, § *6114*), or in any other way, what particular shares or what number of shares had been levied upon, so that the public was not informed by the notice of sale what shares were to be sold, and bidders at the sale were not authentically informed and did not know what they were bidding upon; (2) the whole number of shares was offered and sold in bulk, and not in parcels.

On the question of jurisdiction he cited: *Rorer*, §§ *850, 862, 894; Cavenaugh v. Jackeway, Walk. Ch., 345; Coffey v. Coffey, 16 Ill.; San Francisco v. Pixley, 21 Cal., 60; Bearfield v. Stevens, Harp. (S. C.) Eq., 43; Hamilton v. Shrewsbury, 4 Rand. (Va.), 427.*

The circuit judge did not make the order setting aside the sale as matter of discretion, on the case made by the affidavits, to prevent oppression and hardship, etc., and if he had done so, his decision could not be reviewed on *certiorari*.

MARSTON, J:

In May, 1872, Blair recovered a judgment against Compton, in the circuit court for the county of Monroe, for upwards of ten thousand dollars. Execution was issued upon this judgment November 29th, 1872, and on the same day a levy by virtue thereof was made upon all the shares of stock in "The West Virginia Oil and Oil Land Company" standing in the name of said defendant. Other proceedings, hereinafter noticed, took place, and on the 7th day of April, 1875, a sale was made of such stock to William D. Thompson. On the 19th day of May notice of a motion was entered in said court and cause, that a motion would be made before said court on the 28th day of June to set aside said execution, and the sale made thereunder, for

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irregularity, and that such motion would be based upon the affidavits that day filed. The notice of such motion served upon plaintiff's attorneys was, that such motion would be based upon the affidavits filed, copies of which were served, and also on the return of the late sheriff of Monroe county to such execution.

At an adjourned term of the circuit court of Monroe county, held on the 28th day of June, the motion came on to be heard, the attorneys of the respective parties in interest being present; owing, however, to the absence of one of defendant's counsel, application was made on the part of the defendant, to postpone the submission and hearing of the motion to some future day; whereupon it was agreed by all the respective counsel then present for the several parties, that the motion should be heard before Hon. Daniel L. Pratt, circuit judge of the first judicial circuit, in which are situate the counties of Monroe and Hillsdale, at chambers at the court house at Hillsdale, on the 12th day of July, at 2 P. M.

Upon the 9th day of July additional affidavits were filed, and copies served with a notice that they would be presented to the court on the part of the defendant on hearing of said motion at the time and place agreed upon. Copies of all these affidavits and notices were served upon plaintiff's attorneys, and also upon Mr. Thompson, the purchaser of the stock on the execution sale. On the 12th day of July, at the time and place agreed upon, counsel for the respective parties appeared, the counsel for plaintiff appearing also for Mr. Thompson. Affidavits on the part of plaintiff and Thompson were presented, and the motion argued upon that and the next day. On the 14th day of July an order was made and signed by said circuit judge at chambers, transmitted to the clerk of said court and filed on the same day, setting aside said execution sale as being null and void.

Upon the argument of the motion, counsel in support thereof, insisted among other things, that upon the face of the sheriff's return and certificate attached thereto, both the

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levy and sale were void. Counsel opposing the motion replied thereto, but made no objection that any question as to the validity of such levy or sale, arising upon the face of the sheriff's return, independent of the affidavits, was beyond the scope of the motion.

Thompson and Blair afterwards join in a petition for a certiorari, claiming that the order setting aside said sale is void, as being beyond the jurisdiction of the judge who made it, for three reasons:

First. It was not within the legal power of a circuit judge to hear such matter and make such an order in any like case at chambers;

Second. It was not within the legal power of said judge at chambers, nor of the said circuit court in and for the county of Monroe, to make an order in effect taking from petitioner Thompson, in a summary proceeding, not according to the course of the common law, upon *ex parte* affidavits, substantial and valuable rights of property acquired at a public judicial sale without fraud or evil practice on the part of any one;

Third. There was no jurisdiction to declare and decide the execution sale to be "null and void" as matter of law, upon the papers and in the proceedings had therein.

While counsel for Blair and Thompson in this court, in his brief and upon argument, insisted, that Thompson being a purchaser in good faith and for a valuable consideration actually paid, and not being a party in the original cause, his rights could not be tried and determined upon *ex parte* affidavits, and that the order itself, being a chamber order made by the judge at chambers in the county of Hillsdale, was a nullity, and did not furnish a basis on which to enter an order in open court in the Monroe circuit, yet he conceded, both in his brief and upon the argument, that the circuit judge did not consider the affidavits read upon the hearing of said motion, but held the sale null and void from an inspection of the execution and return alone. He also, in his brief and upon argument, says this question of void

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levy and sale is the real meritorious question in controversy; that all parties are willing and anxious to have it decided on this record, as the facts are all here as fully as a case in chancery could present them, and that a failure to decide the real question now would but cause a weary and expensive litigation of no benefit to either party.

Should we, however, pass unnoticed the preliminary questions raised, as counsel desires us, and confine our entire attention to the merits of the real question in controversy, our right so to do might hereafter be questioned, because if the circuit judge at chambers, as in this case, could not make such an order, then there is no reason or necessity for our proceeding any farther. We shall, however, under the circumstances, content ourselves with a brief statement of our conclusions upon these questions, without discussing them at length, as we otherwise might have done.

The circuit court for the county of Monroe, being the court from which the execution issued in this case, as between the parties thereto, had undoubtedly the power upon motion to set aside the levy or sale for any illegality appearing therein. The court could also, in case of an excessive levy, and in case where the property was sold at an inadequate price, set aside the levy and sale upon motion. In these last cases if the facts did not appear upon the face of the papers, as ordinarily they would not, they might be shown by affidavits, and the facts thus appearing, the court would grant relief. Every court controls its own process, and will prevent an abuse of the same, if its attention is seasonably called thereto upon motion.—*Cavenaugh v. Jakeway, Walker's Ch., 344; Campau v. Godfrey, 18 Mich., 44.* In the case in *Walker's Ch.*, the court holds there must be fraud to give a court of chancery jurisdiction, that neither the fact that the sale was irregular, nor that Jakeway the purchaser was not a party to the suit, would give that court jurisdiction.

The circuit court, then, having jurisdiction to hear and determine the question upon motion, and the plaintiff hav-

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ing by his counsel appeared and consented that the motion should be heard at chambers, and having there appeared and opposed the motion upon its merits, making no objection to the jurisdiction, he cannot now come in and make a technical objection to the right of the judge to hear the argument and make the order in this case.

In order to succeed under such circumstances it should clearly appear that consent would not confer jurisdiction. And the same reasons apply to Thompson that do to the plaintiff. Copies of the affidavits and notice of the motion were served upon Thompson. He appeared by counsel; opposing affidavits in his behalf, his own amongst others, were filed and read; and no objection was made that he being a third party his rights could not thus be passed upon. We think that any right to question in this proceeding the power of the circuit judge was waived.—See *Patterson v. McRea, 29 Mich., 258; Peck v. McAlpine, 3 Caines, 166 b.*

The purchaser at a judicial sale must be considered as having submitted himself thereby to the jurisdiction of the court as to all matters connected therewith, and when he has had notice and appears in answer thereto and makes no objection, but goes to a hearing on the merits, he is not in a position to afterwards object to the power of the court to decide such motion.

We will now proceed to ascertain whether there was a valid levy and sale of the property in question, and it might be well for us before examining what was in fact done by the officer, to first lay down the legal principles which must govern us in this case.

1. At common law corporate shares were not subject to levy and sale upon execution. This, however, has been changed by statute in many of the states, and where such a change has been made, the authorities all agree that if the statute authorizing such a levy and sale has not been substantially complied with, then the sale is unauthorized and void, and cannot, as in a case of a sale being voidable merely on ac-

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count of some irregularity, be ratified.—*James v. Pontiac & Groveland P. R. Co., 8 Mich., 92; Howe v. Starkweather, 17 Mass., 240; Princeton Bank v. Crozer, 2 Zab., 383.*

2. A levy made after the return day of the execution, or after the official term of the officer has expired, and a sale made thereunder, is void, but where the officer has commenced the execution of the writ before the return day, he may complete it afterwards, and so where he has commenced its execution during his official term, he may complete it after his term of office has ceased. Such was the rule at common law, and it has been recognized by statute in many of the states. Our statutes in this respect are but declaratory of the common law, and will be noticed hereafter.—*Wheaton v. Sexton's Lessee, 4 Wheat., 504; Remington v. Linthicum, 14 Peters, 93; Phillips v. Dana, 3 Scam., 551; Wood v. Colvin, 5 Hill, 231; Childs v. McChesney, 20 Iowa, 438; Butterfield v. Walsh, 21 Iowa, 101; Stein v. Chambless, 18 Iowa, 476; Ferguson v. Lee, 9 Wend., 258, 260; Willoughby v. Dewey, 63 Ill., 248.*

3. The statutory requirements regulating proceedings upon execution are duties which the ministerial officer of the court executing its process is required to perform. The general rule of law is, that there is no presumption that an officer has neglected his duties. In other words, the presumptions are in favor of the regularity of the acts of the officer.—*Herman on Ex.*, § *345*, and the numerous cases there cited. This rule has been recognized and acted upon in this state, under a variety of circumstances.—*Peck v. Cavell, 16 Mich., 11; Hall v. Kellogg, 16 Mich., 135; Allen v. Mills, 26 Mich., 126; Saunders v. Tioga Manf. Co., 27 Mich., 523; Morse v. Hewett, 28 Mich., 485.*

In the light of these rules we will examine the facts. That a judgment valid in every respect was recovered against Compton and an execution regularly issued November 29, 1872, and delivered to Phillip M. Nadeau, then sheriff of

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Monroe county, is conceded. Nadeau, as sheriff, upon the same day made the following endorsement upon the execution:

"STATE OF MICHIGAN, COUNTY OF MONROE.—ss.

"By virtue of the within and attached execution, I have this day seized and levied upon all the shares of stock in 'The West Virginia Oil and Oil Land Company' standing in the name of the defendant in execution herein, Benjamin S. Compton; that there was no clerk, treasurer, or cashier of said company in my bailiwick, and that thereupon I served a true and certified copy of this execution upon the following persons, who, I was informed, had the custody of the books and papers of the said company: William H. Boyd, deputy secretary or clerk of said company; William M. Smith, in charge of the office of the company, and Benjamin S. Compton, president of said company; and at the same time demanded of them, and each of them, to give me a certificate of the number of shares or amount of interest held by said Compton in said company, which they declined to do." He further certifies that on the same day he levied upon certain real estate, and also gives a copy of the notice by him endorsed upon the copies of the execution which he delivered to the above parties.

The statute provides that the share or interest of a stockholder in a corporation may be taken in execution and sold in the following manner: "The officer shall leave a copy of the execution, certified by him, with the clerk, treasurer, or cashier of the company, if there be any such officer, and if not, then with any officer or person who has, at the time, the custody of the books and papers of the corporation; and the property shall be considered seized on execution when such copy is left."—§§ *6112, 6113, 2 C. L.*

The levy here made it is insisted was void, because *first*, the return does not show service of a copy of the execution upon either the clerk, treasurer or cashier of the corporation, or that there was no such officer, in which event alone service might be made upon some other person, and *second*,

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the return does not show service upon any other officer or person who "had at the time the custody of the books and papers of the corporation," but only that it was made upon three persons named, who the sheriff was informed had such custody.

Was then the service in this case, looking at the return alone, in compliance with *section 6113* already quoted? That section must be construed in connection with the one preceding it, and also with the general statute authorizing the organization of corporations. *Section 6112* is general and authorizes the sale of a stockholder's interest in a "bank, insurance company or any other joint stock company," and when in *section 6113* the sheriff is required to leave a copy of the execution with the "clerk, treasurer, or cashier," it was not thereby conclusively assumed that such officers, or indeed any of them, would be found in every corporation and joint stock company intended to be embraced in *section 6112*, or that even if every corporation embraced therein did have a clerk, treasurer, or cashier, the copy must be delivered to one of them, and that in the event only of there being no such officers could the service be made upon some other officer or person having the custody of the books and papers.

The construction contended for would defeat the evident intent of the legislature, which was to authorize the levy and sale of a stockholder's interest in any corporation or joint stock company. This is apparent when we examine the statute under which many of our corporations, including the one in question, was organized.

Chap. 95 of the Comp. Laws, relating to mining and manufacturing companies, authorizes the company to elect "all necessary officers."—§ *1*. Before the corporation shall commence business the "president and directors shall cause their articles of association to be filed with the secretary of state."—*Sec. 3*. "The directors shall choose one of their number president, and such other officers as their articles of association and by-laws may require."—*Sec. 10*. *Sec.*

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18 requires an annual report to be made, "signed by the president and a majority of the directors, and shall be verified by the oath of the secretary, or other officer making the same." Without reciting further, an examination will show that the only officers which the statute actually requires as essential to manage and carry on the business of the corporation is a president and directors. A "clerk, treasurer, or cashier" is nowhere required, nor is a secretary, conceding the words clerk and secretary to be synonymous. The corporation may provide for and elect or appoint such officers, but it is not bound to. Whenever the statute speaks of a duty to be performed by a secretary, it in the same connection recognizes the fact that there may be no such officer, and that such duty may be performed by some other officer. Nor would the fact that a report required by statute was verified by the president or a director as the "officer making the same," make such officer either a secretary or clerk within the meaning of *Sec. 6113*. Neither do I think the fact, that one of the directors was in the habit of keeping and recording the minutes of the corporation, drafting reports, etc., would make him a clerk, within the meaning of the section last referred to. Under such circumstances he would undoubtedly come within the second clause of that section as an officer or person having the custody of the books and papers of the corporation. It is therefore quite possible for a corporation to be formed in this state, issue shares of stock, and do business, and yet have neither a secretary, clerk, treasurer or cashier.

If, however, a corporation formed under this chapter should, in its articles of association or by-laws, provide for the election of either a clerk, treasurer or cashier, or all three, and in fact elect them, there is no provision requiring either or any of such officers to reside in this state. On the contrary, the statute recognizes the fact that they need not. The company may provide in its articles of association "for having the business office of such company out of this state, at any place within the United States, and

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to hold any meeting of the stockholders or directors of such company, at such office so provided for; but any such company, having its business office out of this state, shall have an office for the transaction of business within this state, to be also designated in such articles."—*Sec. 2685.*

If, therefore, the clerk, treasurer and cashier should reside out of this state, and there should be a deputy secretary or clerk of said company "in charge of the books and papers" at the office of the company in this state, nevertheless there could be no levy and sale under an execution of a stockholder's interest in such corporation, under the view of counsel, because there being in fact a clerk, treasurer and cashier of such corporation, the sheriff could not certify "that there was no such officer, in which event alone, the statute authorizes a substituted service upon some other person." And it is not claimed or pretended that the sheriff would have any authority to serve copies upon such officers outside this state. He could not serve a copy of the execution upon such officers, because they are out of the state, and therefore beyond his jurisdiction. He could not certify that there were no such officers, therefore the judgment creditor is without remedy. Such a construction would enable corporations in very many instances to protect the shares of their stockholders from levy and sale upon execution, thus defeating the evident intent of the legislature.

I cannot consent to any such construction, or content myself by saying that the legislature did not contemplate such a condition of things, did not provide therefor, and that additional legislation is necessary. The intention, as already said, is clear, and expressly gives the judgment creditor the right to levy upon and sell the interest of his debtor in any corporation formed under any law of this state. We are not at liberty, therefore, to defeat this intention, if the other provisions, pointing out the method of levying and selling, will, by any reasonable construction, meet the case.

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The statute requires that in every case there shall be an office within this state for the transaction of business. The presumption must be that the officers of the corporation, if within the state, will be found at the office which the company by its articles of association designates as the place for the transaction of its business. If the sheriff of the proper county where such office is located certifies that there is no clerk, treasurer or cashier within his bailiwick, I am of opinion that this is sufficient; that he may then serve a copy upon any officer or person who has at the time the custody of the books and papers of the corporation.

Does it then sufficiently appear that the office of the company in this state was in Monroe county? I think it does. Such is the fair legal construction of the officer's certificate. Although he does not certify that the office of the company was in Monroe county, yet he does certify that he served a copy of the execution upon "Wm. M. Smith, in charge of the office of the company," and we cannot presume that the sheriff went outside his county to do this.

We now come to notice the second objection to the levy, viz: that the return does not show a service upon the officer or person who had at the time the custody of the books and papers, but only that the officer was informed they had such custody.

That portion of the return upon which this objection is based is as follows: "I served a true and certified copy of this execution upon the following persons, who, I was informed, had the custody of the books and papers of the said company, William H. Boyd, deputy secretary or clerk of said company, Wm. M. Smith, in charge of the office of the company, and Benjamin S. Compton, president of the company." The officer's certificate is clear and explicit, that he served the papers upon the persons named, and that they held the positions in the company stated. The qualification as to what he was informed applies only to the fact of these persons having the custody of the books and papers. Could the sheriff act upon such information? We might

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answer this by asking in what other way could the sheriff ascertain who had the custody of the books and papers? Suppose he went to the office of the company, found the books and papers there, and also found several persons in the office, all apparently having equal rights and privileges; how is he, in such a case, to ascertain who has the custody in fact of the books and papers; or in case he found several persons in the office, but did not see the books and papers, how is he to ascertain whether they are there or not, and if they are, who has the custody of them?

Now, in the case first supposed it is not at all probable that even an inspection of the books and papers, were he permitted to make such an inspection, would give him the requisite information, and in the second case, unless he was permitted to examine the office he could not determine whether the books and papers were there, and when he did ascertain that fact, the question as to who had the custody of them would still be open. He could ascertain those facts only from making inquiries of those present who were apparently the officers of the company, or the apparent custodians of the papers. Where a sheriff goes to the office of a corporation and makes inquiries concerning its business, from those he there finds assuming to act as its officers, the corporation and its stockholders must be considered as bound by the information given; and if he is there informed, or if the officers of the company in any place inform him, of the persons having custody of the books and papers of the corporation, he may act upon such information, and the corporation and its stockholders will be bound by the information given. The officers in fact, or those in charge of the office, assuming to, and who are permitted to act as its agents or officers, must be held as having authority to bind the corporation to this extent. Third parties have a right to act upon the apparent authority of those found in possession and control of the office of the corporation. An individual dealing with one assuming to act as the cashier of a bank does not act at peril of the person turning out

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not to be the cashier, and the bank therefore not being bound by his acts. The fact that he is permitted to occupy that position, and assumes to so act in the office of the bank, is sufficient. Now, we all know and must recognize the fact that a sheriff in the performance of his official duties must frequently act upon information received from others. In the service of process he does not always of his own knowledge know the person upon whom service is to be made. This information he derives from others. How frequently does he levy upon and sell personal property where the only knowledge he has that it belongs to the execution debtor is what others have told him. Let us test this still further. A corporation whose principal and only office is in this state, elects or appoints a clerk, treasurer or cashier; must the sheriff examine the records kept of such election before he can serve papers upon them and certify to the fact? Must he in every instance ascertain from the records whether a person assuming to act as president of a corporation is so in fact, before he can serve a summons upon him as commencement of suit against the corporation? But suppose there was no record kept of such election or appointment, what is he to do then? Or if there is, and he ascertains that A B was elected, how is he to ascertain whether the person upon whom he serves the papers is the one elected? Evidently in all these cases by making inquiries and satisfying himself of the fact. Upon a trial in court it would not be necessary to produce record evidence of the election or appointment of an officer; parol evidence would be sufficient; and I know of no good reason why any stricter rule should be applied in this case. The presumption must be that the books and papers of a corporation are kept at its office, and that those in charge of the office are there with the permission and authority of the company, and have the custody of the books and papers. There is still another ground upon which this may be rested. If the officer received his information from the execution debtor, who, he certifies, was president of the corporation, then no

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one will dispute the fact that the information would be sufficient and would estop the defendant from now showing the contrary. While it does not appear that he received his information either from the president or from any officer of the company, or any one assuming to act as an officer in charge of its office, yet, as already stated, all presumptions are in favor of the validity of the officer's acts. So that if information from a particular source was necessary to enable the sheriff to serve the papers upon the persons named, we must assume that he received his information from that source, else he would not have so served them. In other words, he having acted upon information, we must assume that he derived it from the proper source, and that it was sufficient.—See *Morse v. Hewett, 28 Mich., 485*, and cases there cited, as well as those previously cited upon this point. I am of opinion, therefore, that the return of the officer shows a valid levy made on the 29th day of November upon defendant's stock in the corporation. This being so, a sale could be afterwards made, even after the return day of the execution and after the term of the officer had expired.

But even if this levy was not complete, I am of opinion that what took place on the 22d of July following was sufficient, and that the levy previously commenced was thereby perfected.

The return shows that on the 13th of December the sheriff was officially notified that the defendant had caused a writ of error to be issued out of this court in said cause, and had filed the proper bond. This, under the statute, operated as a stay of all further proceedings upon the execution. The judgment having been affirmed, Nadeau, as appears from his return, as late sheriff of Monroe county, at the request of the plaintiff's attorneys, on the 22d day of July, delivered to Talcott E. Wing, the then treasurer of the West Virginia Oil and Oil Land Company, a certified copy of the execution, with a demand to deliver to him a certificate of the number of shares or amount of interest

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held by said defendant in said company. I have already said that at common law when an officer commences the execution of a writ before the return day he may complete it after the return day, even though his official term may have ceased.

Sec. 573, Comp. Laws, provides that notwithstanding the election of a new seriff, the former sheriff shall return in his own name all writs, etc., "and shall proceed to complete the execution of all final process and attachments which he shall have begun to execute, by a collection of money thereon, or by a levy upon property in pursuance thereof." § *6111*, is as follows: "When an officer shall have begun to serve an execution issued out of any court of record, on or before the return day of such execution, he may complete the service and return thereof after such return day." While at common law, there might be some question as to how far an officer must have proceeded before the return day, some courts holding that the levy must have been complete, others that he had commenced to make his levy, I think this statute must be considered as settling the question, that the levy need not be complete and perfect on or before the return day in order for the officer to proceed afterwards. Now, without discussing the essentials necessary to constitute a valid levy, it must be conceded that time is required for that purpose. If the claim is a large one, and the property is scattered, considerable time may be required for the officer to actually seize and take possession of sufficient to satisfy his execution. How far then must he have proceeded with his levy in order to have the benefit of this statute? Must the levy be complete and perfect before the return day, and nothing remain to be done but advertise and sell? Or in case he has commenced to make a levy but has been unable to complete it, can he after the return day perfect the same? The statute reads, when he shall have begun to serve an execution on or before the return day, he may complete the service and return thereof after such day. If the legislature intended to give an officer authority to pro-

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ceed in case the levy was completed on or before the return day, and not otherwise, I think different language would have been used; and if we once concede the right to do any act after the return day in order to perfect the levy previously commenced, it then becomes very difficult to draw any line and say just what may or may not be done after the return day. Delivery of an execution to an officer, without any act being done by him in the service thereof, would not be sufficient, but where an officer has in good faith begun the service of it, by an attempt to levy upon property, although that levy may not have been perfected, I think he may after the return day proceed to complete his levy and sell the property. It would be difficult if not impossible to lay down any general rule applicable to all cases; each must be determined upon its own peculiar circumstances.

In *Clark v. Pratt, 55 Me., 546*, it appeared that the plaintiff claimed title to the land in dispute under an execution sale; that the execution had been issued December 18, 1841. The levy was commenced January 3, 1842, by a seizure of the land, and suspended, as certified by the officer making the seizure, by reason of a subsisting prior attachment in favor of the People's Bank. It further appeared that on March 17, 1842, the appraisers were selected and sworn and the levy completed. The return of the officer, after stating that the prior attachment referred to in his certificate of January 3, 1842, had been disposed of by a levy upon a part of the property attached, proceeded as follows: "I, Winfield Carr, late sheriff of Penobscott, still holding this execution, the same having been placed in my hands for service while exercising the office of sheriff of said county, and having on the 16th day of March inst., taken the real estate described in the foregoing certificate of the appraisers, being a part of the same which was seized by me as aforesaid on the 3d day of January last," etc. It was insisted in this case, upon argument, that the return showed the officer "took" the land on March 16, when he was not an officer; that the taking and appraisal

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must be had while the officer is in commission, and that such acts are conditions precedent to valid subsequent proceedings. *Appleton, Ch. J.*, in delivering the opinion of the court said: "It is in proof that on March 17, 1842, Thos. A. Hill levied on an undivided half of lot 13, by virtue of an execution. It is objected that this levy is void, because at the time of its completion the officer by whom the proceedings were commenced had ceased to be sheriff. The levy was made under *R. S. 1841, ch. 117, §§ 33-34.* But by *chap. 104, § 21*, all sheriffs and their deputies may execute all precepts in their hands at the time of their removal from office. The officer, therefore, having the execution and commencing its service before the termination of his office, might proceed afterwards to complete such service."

Now whether the sheriff could after the return day, and after his term of office had ceased, levy upon new and additional stock, we need not decide, as the affidavit of the defendant shows that at the time of the first levy there was standing in his name upon the books of said company, and he then owned, at least four thousand one hundred and sixty-two shares. To this extent, then, the officer could sell, and for reasons hereafter stated a sale of any interest beyond this cannot be sustained.

It is next insisted that the sale was void, *first*, because made by the sheriff without having first ascertained, in the manner provided by the statute, or in any other way, the number of shares that had been levied upon. The statute *(§ 6114)* makes it the duty of the officer who is appointed to keep a record or account of the shares or interest of the stockholders, upon the execution being exhibited to him, to give a certificate of the number of shares or amount of the interest held by the judgment debtor.

I am of opinion that a compliance with the provision of this section is not absolutely necessary to a valid sale. If the sheriff can, from any source, ascertain the number of shares held by the judgment debtor he may offer the same

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for sale whether the books of the corporation show him as owning any stock or not. In case of a transfer, even although the books of the company do not show the same, yet an execution creditor or purchaser at such a sale, having notice thereof, would get no better title than the debtor had.—*Newberry v. Detroit, etc., Iron Manufacturing Co., 17 Mich., 141.* So if the debtor had purchased shares, although the same did not appear upon the books in his name, yet his interest therein might be sold. In other words, the entries upon the books would not be conclusive as to the interest of the execution debtor. Then again, if the officer required to keep such a record was not in this state, the sheriff could not exhibit to him the execution, and this would prevent any sale if a compliance with this provision should be held necessary.

The return shows that the sheriff advertised to sell all the stock of The West Virginia Oil and Oil Land Company standing in the name of said defendant on the books of the company, or legally or equitably owned by him on the 29th of November or the 22d of July, that he was unable to give the precise number of shares, but estimated the amount at 11,000 shares. He further returns that he exposed the stock described in the notice of sale, be the same more or less, "but represented at the sale to be at least 4,162 shares."

The only uncertainty which existed as to the property sold, was as to the legal or equitable interest which the defendant had over and above 4,162 shares. The property was advertised as estimated at 11,000 shares, and represented at the sale to be at least 4,162 shares.

The purchaser, therefore, was sure of obtaining title to at least 4,162 shares. This was certain. He might obtain more. As to this it was uncertain, but this uncertainty would not tend to prevent his bidding what he considered the full value of the 4,162 shares. It would have an opposite tendency more likely. This uncertainty would however prevent parties from bidding intelligently for the interest the execution

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debtor may have had over and above the 4,162 shares. As to the excess therefore the sale would be void. Beyond this the debtor could not complain. If a larger sum was bid for the 4,162 shares because of the prospect which the purchaser had of obtaining other rights, the debtor could not complain that he was injured thereby, if the sale should be afterwards confirmed, only as to the number of shares definitely ascertained and sold. If either, under such circumstances, could complain it would be the purchaser. But in this case he has not thought proper so to do. He may insist upon the sale being declared valid, and pay the price which he bid, although he may not thereby acquire title to all the property he expected to at the time he made his bid. And if he is willing to accept of less, yet pay the price bid for the whole, I do not see as any other person has a right to complain on that account. The sale may be valid in part, and void in part; valid as to the number of shares definitely ascertained and sold, and void as to all beyond this.

It is in the second place claimed that such sale was void, because these shares were offered for sale and sold in bulk, without having been offered for sale in parcels, and in support of this view the statute is cited, which provides that, "no personal property shall be exposed for sale on execution unless the same be present, and within the view of those attending such sale; and it shall be offered for sale in such lots and parcels as shall be calculated to bring the highest price."—§ *6106*. This statute cannot be applied to all sales of personal property. This court has repeatedly held that where the interest of a mortgagor is sold on execution, the property must be sold entire, and not in parcels. Nor can this statute be applied in cases of sales of stock in a corporation. Shares in a corporation, although for certain purposes treated and considered as personal property, yet cannot for all purposes. They cannot be seized and taken possession of; they cannot be present and within the view of those attending the sale. They are not capable of being treated in this way; they are but the

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mere evidences of property; they entitle the holder to a certain share in the property and franchises of the corporation, and the very fact that at common law they could not be seized and sold upon execution, shows clearly that the rules applicable to the levy and sale of personal property cannot be applied to such shares. It is the interest which the judgment debtor has in the corporation, that is sold and not the mere paper certificates which may or may not truly represent that interest. Whether each share is represented by a separate certificate nowhere appears. Whether such was the fact or not, a sale in bulk would not be void. It might upon proper showing be set aside upon motion. And we are asked, in case we arrive at the conclusion that upon the facts appearing in the sheriff's return the sale can be upheld as valid, to look into the affidavits and see whether on the whole the sale, though not a nullity, ought not in justice to be set aside. The only matter set up in the affidavits which I consider it necessary to notice is what relates to the sale being made in bulk, and the inadequate price the property brought on that account. Upon these grounds a very clear case should be made to warrant us in interfering. It is a well known fact that property sold at a forced sale very seldom brings what the owner considers, or what may be in fact, its market value. The supreme court of Illinois upon a like question said: "But it never has been held that the creditor can be delayed in the collection of his money until the property of his debtor will sell for the price his neighbors may fix upon it, or until it can be sold for as much as might be obtained for it at private sale under favorable circumstances. To hold such a doctrine would well nigh suspend all collections of money under execution sales."—*Noyes v. True, 23 Ill., 504.*

Taking all the facts into consideration, I think the sale upon this ground should not be set aside.

It clearly appears from the purchaser's own showing, that he purchased such stock for defendant's benefit, and to prevent it passing into the hands of strangers, and thus be

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beyond Compton's power of redeeming, and that his intention was to re-assign to defendant upon certain conditions. It would seem, therefore, as though defendant had a right to redeem the 4,162 shares sold, but as the facts in relation to this matter are not so fully before us, we give no opinion thereon, but leave the parties to pursue this matter further should they consider it proper.

I am of opinion, therefore, that the order of the court setting aside the sale should be quashed and held for naught, with costs to the plaintiff.

COOLEY, CH. J., concurred.

CAMPBELL, J:

The *certiorari* in this case is brought to review the order of the circuit court for the county of Monroe setting aside a sale of stock.

The grounds of objection set up in the affidavit are confined to the jurisdiction of the circuit judge to hear the motion or to make such an order; but as it seems to be assumed the action is open here so far as this court can review such proceedings, and as there can be no serious doubt that such motions are admissible, I shall not dwell upon the formal question.

I do not, however, see very well how we can examine into the propriety of the order if it was, as is admitted, within the authority to hear and determine on what was before the judge. He had before him the sheriff's return, and a number of opposing affidavits. Some of these related to the equities of the sale. Some went further and bore upon its legality. The affidavit for *certiorari* shows that these papers were all used and discussed on the motion.

The order of the court is simply that the sale be set aside, vacated and held for naught as null and void. The judge's return is express that the motion was heard and decided on all the papers. And it also shows that the argument upon

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the invalidity of the sale was not confined to the sheriff's return and certificate, but that this was urged "*among other things.*"

Apart from the other matters set out in the affidavits, there was a positive showing, not on information and belief, that the sheriff did not serve any notice or copy of the levy or execution upon the persons mentioned in his return as officers of the company, or upon any one in custody of the company's affairs. As there is now no question but that a sheriff's return can be disputed by the parties over whose interests he has attempted to declare evidence of jurisdiction, and as the record does not disclose that this may not at least have been a ground of decision, we cannot review a decision which, upon such facts, would necessarily follow if the judge believed them. And it seems to me clear that this should dispose of the case.

I think, however, that the sale is void on the return itself.

At common law, and under our practice, a sale of personal property cannot be made on execution unless the property is produced at the place of sale, and within view of the bidders. It must be in the actual control of the officer, and it must be present for identification and delivery. No officer can lawfully sell what he cannot turn over to the purchaser.

It is against the general policy of the law to sell on execution any interest which cannot be thus delivered or seen. Where interests are intangible and incorporeal they are usually reached in equity, where the transfer can be made effectual by coercion of the owner. And all innovations on this rule are statutory, and can only be carried out by close adherence to statutory forms.

The stock of mining companies is divided into shares, and the holders are entitled to certificates which will identify their shares. These certificates are made by statute transferable by endorsement, and the purchaser and endorsee has a right to be received and certified in turn as a stock-

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holder. The amount subject to be assessed may not all be called in at once, or at all, and there may be stock fully paid or part paid, so that all stock is not alike in this respect. These being all statutory regulations as well as common-law incidents, the statute providing for the levy on stock and its sale upon execution must be read in the light of the rules of corporate law; and must be applied accordingly.

The statute allowing levies on stock owned by individual shareholders requires the following routine: The officer is to "leave a copy of the execution certified by him, with the clerk, treasurer, or cashier of the company, if there be any such officer, and if not, then with any officer or person who has, at the time, the custody of the books and papers of the corporation; and the property shall be considered seized on execution when such copy is left."

"The officer of the company who is appointed to keep a record or account of the shares or interest of the stockholders therein, shall, upon exhibiting to him the execution, be bound to give a certificate of the number of shares or amount of the interest held by such judgment debtor."

"A copy of the execution and the return thereon, certified by the officer executing the same, shall, within fourteen days after the sale, be left with the officer of the company whose duty it may be to keep a record of the transfer of shares; and the purchaser shall thereupon be entitled to a certificate or certificates of the shares bought by him, upon paying the fees therefor, and for recording the transfer."—*C. L.*, §§ *6112, 6113, 6114, 6115.*

This shows very clearly that the interests which can be levied on are such legal interests as appear on the corporation records as shares belonging to the judgment debtor, which can be thus identified as his legally, and not equitably, and which can be transferred on the books, as he himself might have transferred them, so as to make complete record title. It must be stock standing in his name. By taking the proper steps the company is notified of the levy, and

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therefore against transferring what is levied upon. But no levy can cover interests subsequently acquired, neither can it cover interests not legally vested by being credited to the judgment debtor as his property on the company books. Till that is done his interests are equitable merely, and not subject to levy. The legal title to stock must always be of record.

While a levy may bind the property if served on any of the officers named, yet before the law officer can identify the stock it must be obtained from the company officer who keeps the stock account, and who may or may not be one of those named. And unless the stock is identified in some way, no purchaser can put himself or be put in a position where the subject of transfer can be placed on record and a new certificate or certificates issued in lieu of those issued or credited to the debtor. Unless these rules are followed no purchaser can know what he is buying, and the officer cannot tell what he is selling; and the result will be, not only that property cannot be sold for its value, but title cannot be perfected.

If any one bound to furnish such information fails to give it, and so leaves the levy uncertain, there is the same remedy open as in other cases where difficulties exist. A bill in equity will lie in aid of the execution. Perhaps there may also be a more summary legal remedy by *mandamus* or otherwise. But the difficulty of finding property will not justify a sale of it at random or out of sight, and the statute in prescribing accurate steps to be taken goes no further than is required in the sale of any personalty.

When a sale is made so that the purchaser knows, as he will thus know, the precise thing he is buying, and that the title is ascertained, as it always is legally on the corporate books, there can be no difficulty in getting bids from those who have any desire to purchase such property, unless sold in such amounts as to amount to a legal fraud, as it was here. The law never contemplated sales in amounts beyond the reach of ordinary purchasers. And it never

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tolerates illusory sales where one purchaser cannot be put in as good a position as others to know what he is called to bid upon.

The notice of sale in this case was not even definite enough to indicate that Compton's record interest was to be sold, or its amount. It advertises all stock standing in his name "or legally or equitably owned by him on the 29th day of November, A. D. 1872, or on the 22d day of July, A. D. 1873." And it states that the precise amount is unknown, but is estimated at 11,000 shares of the nominal value of $50 a share.

This indicates not only that the purchaser must bid on an entire uncertainty, but also that he will have to bid on the whole interest undivided (because unknown), and that the property being nominally worth $55,000, no small bidders need appear. As the last date was beyond the life of the execution, as well as beyond his official term, there was the further uncertainty of what Compton owned in November, 1872.

Upon the return of sale it is stated the amount was represented as at least 4,162 shares. But this does not identify it. It does no good to bidders whom the notice had left in doubt. It does not show that any representation was made as to the title being a legal title,—the notice not so averring it. As a sale of any thing but a legal record title would be absolutely void, the sheriff by undertaking to make a sale in this way must necessarily prevent a fair sale, even allowing his right to sell at all without identifying the property in some more exact way as to amount and other incidents. The fact that the actual purchaser was satisfied is not enough. The debtor has a right to have a chance for fair competition, and bidders have a right to expect the sheriff to be furnished with some evidence which binds the company by a statement of the amount of stock, and ensures them the enjoyment of what they bid upon.

I think the return is fatally defective, and the proceedings are illegal in other particulars upon which I do not

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deem it necessary to enlarge, but for the reasons given I think the order of the circuit judge should be affirmed.

GRAVES, J:

Blair recovered judgment in the court below and sued out execution, and the sheriff took certain steps towards levying on shares of Compton in the oil company, but was interrupted by writ of error sued out by Compton, and bail in error pursuant to the statute. The writ of error was served on the clerk, and the cause was brought here and heard, and we affirmed the judgment. The regularity of the practice in removing the cause, and in the steps to stop action below, has not been questioned. Assuming, as we must, that those proceedings were legal, what was their legitimate effect on the execution, and the doings of the sheriff under it?

Was the act of the sheriff, so far as it went, a legal fact not prejudiced or despoiled of efficacy by the intervention of the writ of error and bail, but left to await the addition, after affirmance, of other such facts as should be needful to constitute a valid completed levy; or, on the other hand, was it an imperfect proceeding which was rendered inconsequential by the operation of the writ of error and bail?

The former position must rest on the broad claim, that at whatever stage the sheriff is arrested after doing any act in part execution of the fact of levy on personalty, whatever may be the amount or whatever the character of the personalty, what is thus done, whether amounting or not amounting to a finished levy on one or more specific items of personalty, must retain its original force, and that every thing beyond what is thus then done and accomplished must be abstained from. There must be at the very time an absolute pause; nothing more, nothing less. The act in part execution of the fact of levy must stand, whilst the stay prevents any additional or further act. If the levy is complete on one thing or on an immense quantity, or even if a sale

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is at hand or begun, whatever may be the nature of the personalty or the incidental or surrounding circumstances, what is done must stand, but all further action must be avoided in obedience to the stay. If we admit that an act towards a levy, but which in itself is not a levy, is of force in this way because it is a step taken under the execution, then, upon the same principle, any other steps, at whatever stage occurring, must be respected and preserved, whilst all further steps or action must be absolutely suspended. The same interpretation of the law which is necessary to support the first must lead to the last.

The operation of such a construction ought therefore to be examined in view of its consequences and results in case of a finished as well as an unfinished levy upon one or more items of personalty before the writ of error comes to apply as a stay.

If a perfect or imperfect levy on personalty is in any instance kept in suspense, the same effect must follow in all cases. Whether the execution has only a few days to run or many, whether it has been applied to one sort of personalty or another, whether the amount is great or small, or whether positive and complete suspension at and from the very time the proceeding in error attaches must cause little or great mischief or damage, can make no difference.

Now wherever the conditions in point of law will admit of it, it is the lawful province of the sheriff in case of levy to exclude the debtor's possession until sale, and in numerous cases his own protection requires the sheriff to do this. His responsibility is necessarily large. Whatever the law considers as susceptible of corporeal subjection under the writ, it supposes he takes in case of levy and keeps under his dominion until regularly disposed of, and no body is under legal obligation to relieve him from any of the direct or incidental burdens. He may it is true make the debtor or a third person if willing his bailiff or keeper, but this is matter of arrangement for his own convenience, and which may or may not be practicable, or if practicable may not

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be prudent. Still his risk must remain. The law casts a heavy responsibility upon him and empowers him to be his own keeper, and he is under no legal obligation or duty to allow removable personalty to be meddled with by the debtor whilst the levy continues actually in force, and if he permits the debtor or third persons to be keeper for him, the sanctity of the levy must remain and the property must continue tied up by it.

The merits of a given construction may be sometimes tested by the supposition of practical cases, and a glance at some among many instances will at once suggest very formidable objections against the idea that whatever step may have been taken when the writ of error attaches, whether the step be one which amounts or falls short of amounting to a finished levy on some item of personalty, all proceedings must at once stop, and the act, whether constituting a levy or something less than a levy, must remain as so much done and not necessary to be repeated. Now a sheriff may have entered upon the making a levy without having gone far enough to consummate it on any thing. Or he may have made a finished levy on particular items and been stopped when about to levy, or when intending to levy on others, or before being interrupted he may have made a finished levy on all the items intended to be levied on. Now suppose the entire stock of one in extensive trade to be put under levy, or the stock and machinery of a great lumbering, or mining, or salt, or manufacturing concern, or the like, to be so placed, must the property so seized continue tied up for an uncertain time? Other cases may be mentioned. Suppose a levy to have been made on a drove or train of hogs, cattle, or other animals requiring great and unremitting attention and labor in their care and custody, and large daily expense for keeping; or suppose the levy to have been made on a mass of perishable property, or on growing crops ready to be harvested, or on property covered by chattel mortgage about due. Instead of a finished levy in these cases, suppose it to be a levy only in part made, so as not

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to be finished in regard to any item. What is to be the consequence? What may the sheriff or others in interest do? If the act of levy is complete, must it stand and the sheriff continue responsible, and every thing remain in the exact situation of the moment in obedience to the supposed operation of the writ of error? If not finished in regard to any item, what then? What is the situation of the proceeding? What is the position of the officer and what is the condition of the property? What are the rights and duties of the sheriff and the parties? Where are the regulations to obviate the difficulties involved in the theory in question? The law is usually particular in taking security and raising guards against embarrassing incidents to be plainly foreseen as likely to ensue from its own special provisions. The statute seems not to have contemplated need for regulations suited to any such emergencies, and can such omission be accounted for otherwise than by supposing no room was understood as left for the emergencies themselves? At common law no bail in error was required, and if no final process had gone, the writ of error so far paralyzed the power of the lower court as to preclude the issue of such process during the pendency of the writ; or if such process had already issued, to supersede it or cause it to be superseded. Still it was held that the execution of such process was an entirety and not severable, and hence if the process had gone out and its execution had actually begun, it should proceed by sale of what had been seized at the time of the intervention of the writ of error, and that the proceeds should be returned into court to abide the event of that writ. No further or additional levy could be made. Neither could an unfinished levy be completed. The execution of the process, so far as such execution had been commenced by full levy on any leviable item, might be completed by sale of such item and return of proceeds. To that property the process had perfectly attached, and as the completion of execution in regard to it required a sale and return of proceeds, those things were not precluded. There could be no sev

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erance of execution. As writs of error became common on trifling grounds, and were often sued out simply for delay, the vexation and hindrance caused by the restraining force of the proceeding induced efforts to correct the practice, and the judges of the king's bench took measures to stay the issuing of the writ without a previous showing that substantial grounds existed; and at a later period the judges of the common pleas resolved that supersedeas should not be made until some manifest and pregnant error should be notified. Subsequently successive parliaments applied a reforming hand, and enacted in substance, that no execution should be stayed or delayed upon or by a writ of error, or supersedeas thereupon be sued, unless bail in error should be given, and the acts prescribed the nature and form of the security and generally the course in giving it.—*2 Tidd, 1202, et seq.; Meriton v. Stevens, Willes, 271; Mills v. Conner, 1 Blackf., 5, note; Blanchard v. Myers, 9 J. R., 66; Belshaw v. Marshall, 4 B. & Adol., 336; Slaughter House Cases, 10 Wall., 273; 3 Bouvier's Inst., Nos. 3342, 3361, 3366.*

Under these provisions the rule was admitted and observed, that if the sheriff had fully levied on any specific goods, and so had commenced execution of the process, he was to go on and sell what he had seized, notwithstanding the writ of error and bail, and accordingly none of the difficulties before suggested as involved in an enforced suspension of all further action could arise. The goods were not required to be tied up subject to a variety of incidental risks and mischiefs and where, too, in many cases there must be repugnant or incongruous regulations. The beginning of execution of the process, which was said to be sufficient to avoid the stay in so far as to allow completion of what had been commenced, had no reference to a mere partial act of levy. The meaning is readily gathered from a view of the facts and language taken together. A distinction is to be observed between the process itself, the finished act which is denoted by the term *levy*, and the stuff or things

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subject to the act. What was meant was an effectual service in respect to one or more specific items; a levy on such item or items, which, as to such property, would be the beginning of execution, and which might be completed or consummated by sale and return of proceeds. No other articles could be levied on, or an unfinished levy be completed, and the meaning of a beginning of execution was not that the process having been levied on one or more things it might be kept up and carried to other things. If nothing was fully levied on, execution of process had not begun at all, and as a consequence of the intervention of the stay, the proceedings remained barren. Nothing could be sold because nothing had been levied on, and the process, being one not partly executed, one not begun to be executed, was stayed or superseded. After the statutes referred to, no supersedeas was deemed necessary.—*Sampson v. Brown, 2 East, 439.* They were sufficient by themselves.—See authorities before cited; also *Lane v. Bacchus, 2 T. R., 44; Jaques v. Nixon, 1 T. R., 279; Braithwaite v. Brown, 1 Chitty R., 238;* ——— *v. Butler, Ib., 241; Sampson v. Brown, supra; Smith v. Howard, 2 Dow. & Ry., 85; Attenbury v. Smith, Ib., note; Bailey v. Baxter, 1 Mass., 156; 1 Root's Summary, 563; Phelps v. Landon, 2 Day, 370; Arnold v. Fuller's Heirs, 1 Ohio (Ham.), 458; Boyle v. Zacharie, 6 Pet., 648; Dutton v. Tracy, 4 Conn., 365; United States v. Dashiel, 3 Wall., 688; Board of Commissioners v. Gorman, 19 Wall., 661.*

The revision of New York in 1830 guarded against sale in such case.—*Tit. 3, Pt. 3, Art. 1, ch. 9, § 30; Delafield v. Sandford, 3 Hill, 473.* Still, when the process was fully executed, as in case of arrest on *ca. sa.*, the English rule was adhered to, that there was no supersedeas to discharge the party from custody.—*Sherrill v. Campbell, 21 Wend., 287.*

I will now quote the provisions of our statute which apply directly. They are contained in three sections of *ch. 227, C. L.*, entitled "writs of error and *certiorari.*"

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§ *7120*. "No writ of error shall operate to stay or supersede the execution in any civil action, unless the plaintiff in error, with two sufficient sureties, or three sufficient sureties without the plaintiff in error, shall give bond to the defendant in error, with condition that the plaintiff in error shall prosecute his writ to effect, and shall pay and satisfy such judgment as shall be rendered against him thereon."

§ *7121*. "The sufficiency of the sureties and the sum for which the bond shall be given, shall be determined in each case by any justice of the supreme court or circuit court commissioner; but the penalty of such bond shall not be less than double the amount of the judgment upon which the writ of error is brought, if such judgment be against the plaintiff in error, nor in any case less than one hundred dollars."

§ *7122*. "The bond, if any be given, shall be filed in the office of the clerk of the court in which the judgment was rendered, at the time of serving the writ on such clerk, and notice thereof shall be given to the defendant in error, or his attorney, and no execution shall thereafter be issued upon the judgment complained of, during the pendency of the writ of error; and if any execution shall have been issued, all further proceedings thereon shall be stayed, upon the officer holding such execution being served with a certificate of the service of such writ, and the filing of such bond, signed by the clerk with whom such bond shall be filed."

These provisions ought not to be read as abstract propositions. They take for granted certain previously settled and understood conditions in regard to the nature and operation of a writ of error, and in order to perceive their real import and application it is needful to consult the system where those conditions were settled, and to which system our own regulations owe their origin. We should also keep in mind the state of our law in regard to what may be taken on final process, and our various and peculiar provisions respecting the execution of such process in special cases. As was

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well observed in *Glenn v. Bank of the United States, 8 Ohio (Hammond), 72, 80:* "As every statute, at the same time that it professes to ordain a new rule, contains also a recognition of a great variety of old ones, by the assistance of which we are alone able to understand and interpret it; it becomes necessary to look both in and out of the statute whenever any controversy arises demanding a construction of it." In substance, the sections I have quoted are very similar to the provisions quoted by *Tidd*, and I see nothing to cause a difference of practice in regard to the right and duty of a sheriff to go on and sell such personalty (when no other conditions are in the way) as he may have fully levied on at the time of the attachment of the stay caused by the proceedings in error. And on the other hand, there seems to me to be special reasons here, beyond what exist in England, for such a course. And these reasons are seen in the almost insuperable difficulties to ensue from a contrary practice, on account of the character of much of our leviable personalty, and the nature of many of our regulations in regard to the subjection of such personalty. Our statute makes no express mention of a case where a levy has been already made, or of a case where the act of levy has only been entered upon. It forbids the issue of execution while the writ of error is pending, and stays, without express limit as to time, all further proceedings on an execution which has been previously issued. The language is broad, but without strong reason it should not be applied as extensively as the words will admit, contrary to the long settled practice under the provisions from which in substance our own were derived, and when to do so, moreover, must cause many serious embarrassments on account of specific peculiarities before noticed.

Then, again, a literal construction would cause the writ of error to operate as a perpetual stay, even in case of a full levy, since the terms, as before mentioned, contained no limit to it. It is likewise material to notice in this connection, that it is expressly enacted that goods and chattels shall be only bound from the time of levy, and not from an

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act towards a levy and not amounting to one.—§ *6091, C. L.* The provision as to stay may be well satisfied by restricting the operation of the stay to an outstanding *fi. fa.*, where no levy at all has been fully made, and as in England, precluding it from attaching in respect to a levy already complete on personalty. Under such construction the execution of the *fi. fa.*, already begun by perfect levy on specific items, can, if nothing else is in the way, be carried out to completion as to such items by sale thereof and payment of the proceeds into court. As to other items no execution would be begun, and as to them the *fi. fa.* would stand absolutely arrested. The English regulations had no concern with a levy on real property, and in the nature of things the practice must or should be different. There may be no solid ground for saying that such a levy should not stand subject to the stay. In *Green v. Arnold, supra*, the supreme court of Ohio held that a levy on land was not vacated by writ of error and supersedeas; but the point need not be decisively considered now. In the case at bar there was no finished levy at all on any stock when the stay attached, and according to the English rule and the prevailing course in this country the transaction when the stay in error took effect was of no greater force as an execution begun of the *fi. fa.* than would have been a movement of the sheriff for the purpose of levying on goods without levying on any. The sheriff was arrested in his movement before levy was consummated on any thing, before the *fi. fa.* was fastened to any stock.—§ *6091, C. L.* All that had been done was an attempt to levy. And the attempt, as something falling short of a levy, was not a proceeding capable of independent existence as a legal fact, and which, after cessation of stay, could be pieced out by the addition of other facts. It was not good as a levy, and it could not be good as the fraction of a levy. To be recognized as a beginning of execution, the proceeding should be at the least in substance a levy, and not merely a movement towards making one. The law should no more recognize it as an independent legal fact, severed from other acts necessary to create a levy, than i

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would divide execution of the *fi. fa.* It must amount in substance to a levy when the stay applies. If it do not, it is a mere circumstance not within legal vision and not apprehensible as a legal fact to stand as so much done once for all. What actually took place did not amount to a merely irregular levy on the stock, and it is plain that it was not understood to be such. If it had amounted to a full levy, then, according to my view, there would have been nothing to stay a sale, and it would have been the sheriff's duty to proceed and sell without unnecessary delay, and return the proceeds. I have confined my attention to the operation of the writ of error and bail, and have not referred to possible occasions for special stays by rule or order. The conclusion is, that the *fi. fa.* ceased to have any operation as against the stock when the proceedings in error attached. If correct in this, it follows, of course, that the order setting aside the sale ought not to be disturbed.

The court being equally divided, the order of the court below was affirmed under the statute.

Cortez P. Hooker v. Livingston Axford and another.

Wills; Husband and wife: Attorney: Confidential relations: Fraud. A wife being desirous of devising her property so that her husband should have the benefit of it but his creditors should not deprive him of her bounty, and having consulted an attorney in the matter, and at his suggestion having devised the property in absolute terms to the attorney and another, on an oral understanding that they should hold the same for her husband's use, the facts being undisputed and the attorney admitting the whole case and signifying his readiness to perform on his part, the trust was enforced in equity against the other devisee.

Evidence: Equity jurisprudence: Fraud. The circumstance that the husband was the medium of his wife's communications with the attorney, and that the only positive and distinct evidence of her intent to bestow the property on her husband consists of his statements at the time and of his testimony in the cause, is not an insuperable obstacle to the granting of relief, where many surrounding circumstances and facts that are undisputed corroborate, and none are in conflict with it.

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HOOKER *v.* AXFORD.

Attorney and client: Abuse of confidence: Fraud. An attorney thus advising the devise of property to himself on the pretense that he would only make use of it for another, but intending nevertheless to appropriate it to his own use, would be guilty of a gross fraud and breach of confidence; and it would be equally a fraud if, having given the advice honestly, he should afterwards conclude dishonestly to keep the property.

Fraud: Attorney: Associate. And the party who, under such attorney's advice, was associated with him as trustee, would be in like position, and it would be a fraud in him to appropriate that which only by the attorney's advice, given for another person's benefit, is brought within his reach.

Lands purchased by one and conveyed to another: Trusts. One who has voluntarily purchased lands and caused the title to be vested in another who retains them, is precluded by the statute (*Comp. L.*, §§ *4120-1*), in the absence of fraud or mistake, from all relief, either at law or in equity.

Heard January 6 and 7. Decided April 11.

Appeal in Chancery from Macomb Circuit.

E. W. Meddaugh and *Giles Hubbard*, for complainant.

A. C. Baldwin, and *G. V. N. Lothrop*, for defendant Axford.

COOLEY, CH. J:

The case of the complainant is, that in the month of August, 1861, his wife Margaret, who was the owner of a lage amount of real estate, being desirous of devising the same to him, but having in mind certain pecuniary transactions which might cause him serious difficulty, sent him to consult the defendant Crocker as to the proper method of securing her property to complainant without the risk of its being seized by others, and that under Crocker's advice the property was all devised to the defendants on an oral understanding that they should hold the same for complainant's use. The wife died in the following month, the will was duly probated, and the title to the property has ever since remained in the defendants, but with constant recognition of the understanding which has been mentioned, until very recently, when defendant Axford, who was nephew to Mrs. Hooker, set up a claim to half the property as his own. Meanwhile complainant has constantly occupied the property

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as owner, made improvements, and paid off incumbrances, and he has also purchased other lands the title to which he has caused to be conveyed to defendants on the understanding that they also were to be held for him. And the bill is filed to compel them to convey to him as well the lands devised by the wife as those subsequently purchased.

The defendant Crocker admits the whole case made by the bill, and is ready to tender a conveyance. This relieves the case from any difficulty so far as he is concerned. Mr. Crocker appears to have acted in entire good faith, and no question is made of his readiness at all times to acknowledge complainant's rights.

The defendant Axford expresses entire ignorance regarding the intent and purpose of Mrs. Hooker in devising the lands as she did, and puts the complainant to his proof; and it is upon this part of the case that the difficulties arise. Axford holds the legal title to one-half the land by a devise explicit in its terms, and which on its face fails to indicate that any third person was to be the object of the testator's bounty. No charge of fraud is made against Axford, and the evidence all tends to show that he was entirely passive at the time the will was executed, and had nothing whatever to do in procuring it. What the complainant seeks to do, therefore, is to control the devise by parol evidence, and to give the testator's bounty a direction wholly different from that given by the will itself.

If there were clear and distinct evidence, other than that of the complainant himself, that his wife intended to make him the object of her bounty, I should think the case relieved of one great difficulty. But there is no such evidence. The complainant was the medium of her communications with Crocker, and it is from his statements at the time, and from his testimony now, that we are to gather what her wishes and intentions were. I cannot avoid thinking that this is a very dangerous species of evidence to act upon when the question is whether we shall upon the strength of it change the apparent intent of a devise in favor of the party giving the evidence.

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There are certain facts, however, that are undisputed, and which my brethren think are conclusive in complainant's favor. One of these is, that Crocker advised the will to be made as it was for the benefit of complainant. Now it is possible that without such advice the testator might have made the same disposition of her property, and she may have contemplated it before Crocker's advice was obtained. But it would certainly have been remarkable if the advice given for complainant's benefit should in the naming of trustees have coincided exactly with those she intended to provide for. Another fact is, that the will gave the property to two persons who do not seem to have been anticipating gifts for their own benefit, and left the husband, who would naturally be the object of the wife's bounty, substantially without a home. And this fact must go a great way to support the complainant's evidence; for he was the active agent in procuring the will, and it is incredible that he should have acted as he did, if he supposed it was to be devised away from him. Another important fact is, that for years after the testator's death Axford left complainant in the undisturbed possession and enjoyment of the property, precisely as he should have done if complainant's account is correct, but as he would not have been likely to do if he had supposed he was to have a beneficial interest in the devise. These facts are so conclusive as to Axford's understanding of the testator's intention, that I am not disposed to dissent from the conclusion of my brethren, that as to the devise Axford stands in no better position than Crocker.

The will, then, must be regarded as made as it was because Crocker, who was an attorney at law, advised that it should be. If he had given the advice intending to appropriate the property, this would have been a gross fraud, and a gross breach of confidence. It would be equally a fraud if, having given the advice honestly, he should afterwards conclude dishonestly to retain the lands. And this being his position, the party who, under his advice, is associated with him, is in the like position. It would be a fraud in Axford to appropriate that which only by the

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advice of Crocker, given for another person's benefit, is brought within his reach. The fraud on Mrs. Hooker's estate would be exactly the same, whether one or the other of the nominal beneficiaries repudiates the trust.—*Lutterel v. Lord Waltham, 11 Ves., 638; Huguenin v. Baseley, 14 Ves., 273.*

As regards the lands which since Mrs. Hooker's death the complainant has procured to be conveyed to defendants, the case is different. The act of vesting in the defendants the title to these lands was that of complainant exclusively, counselled or procured, so far as the case shows, by no other person. The statute, *Comp. L. 1871,* §§ *4120, 4121,* is very positive and explicit that in such a case no trust whatever shall result in favor of the party procuring the conveyance, but the title shall vest in the grantee named therein, subject only to the rights of creditors. No circumstance of fraud or mistake attended these conveyances which can give jurisdiction for equitable relief. On complainant's own showing, by his own folly he has put his property in the hands of others under circumstances which the statute declares shall preclude him from any remedy. If the parties see fit to recognize in him any equitable rights, they may do so, but whether they will, is a question which addresses itself solely to their own sense of right and of honor.

The decree of the court below must be so modified as to except from its provisions giving relief as against Axford, all the lands that have been conveyed to the defendants since Mrs. Hooker's decease. In other respects it will be affirmed. The defendant Axford will be entitled to costs on this appeal.

The other Justices concurred.

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William H. Stevens v. Jeffrey Corbitt.

Railroad: Voluntary subscriptions: Completion of the road. Where a party promises to contribute in aid of a proposed railroad, it would be implied as a condition, in the absence of express conditions, that the road should be constructed and operated; and upon this being done within a reasonable time, where no time was fixed, the promise would become operative and binding, and the party making it could not thereafter repudiate it.

Promises in aid of proposed railroad: Company organized. The fact that a company was organized to build the road, at the time the promise was made, or that even in the absence of such a promise the road would have been built, would not defeat the promise.

Railroads: Voluntary subscriptions: Conditional promises: Completion of road: Condition performed. Where such a promise is made to some one necessarily connected with or interested in the work being done, for the benefit of the company that has begun, or is about to undertake the work, then, upon completion of the work, or upon the performance of the conditions upon which the promise was made, the liability of the promisor becomes complete; there are also cases where expense is incurred or an obligation created under the promise, where a like liability would follow.

Conditional promises: Performance of condition: Reliance on the promises. In all such cases the fair inference is, that the work was done or the expense or liability incurred in reliance upon the subscription or promise.

Voluntary subscriptions: Interest. An allowance of interest on such a subscription from the date of the completion of the road, where the promise was to pay one year after its completion, and nothing is expressed about interest, is error.

Conditional promise: Uncertain event: Interest: Demand: Suit brought. An agreement to pay within one year from the happening of an uncertain event ought not to bear interest, in the absence of any express promise to pay interest, until after demand, or where no demand was made, until suit brought.

Heard January 12. Decided April 11.

Error to Montcalm Circuit.

M. C. Palmer and *Lemuel Clute*, for plaintiff in error, argued that the declaration averred a promise based on an executed consideration, and that to support a promise grounded on a past consideration it must appear that the consideration moved at the request of the promisor: *Comstock v. Smith, 7 Johns., 87; Parker v. Crane, 6 Wend., 647;* and a mere voluntary courtesy to the defendant will not support an after-made promise: *1 Smith's L. C., 265–7.*

Notwithstanding the words "value received," it was

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competent to show there was in fact no consideration: *Osgood v. Bringolf, 32 Iowa, 265; Jerome v. Whitney, 7 Johns., 321; Colbath v. Jones, 28 Mich., 280; People v. Howell, 4 Johns., 226; Fink v. Cox, 18 Johns., 145.*

While a promise to pay a railroad company a specified sum of money on condition of its building a certain road in a specified time, may in some cases, on performance of the condition, be clothed with a valid consideration which related back to the promise and thereby became a valid and binding contract, it must be made to appear not only that the offer made by the promise was accepted by performance, but also that the performance was in reliance upon the promise; and the acceptance and performance must be by the promisee.

If the contract be treated as a subscription, it must be shown the road was constructed by the promisee in reliance on the promise: *People v. Taylor, 2 Mich., 253; Underwood v. Waldron, 12 Mich., 73;* and the declaration should have averred the promise to be to give so much to build the road, and that the offer was accepted, and the road built relying on the offer: *Utica, etc., R. R. Co. v. Brinckerhoff, 21 Wend., 141.*

George A. Smith and *Blanchard & Bell,* for defendant in error.

MARSTON, J:

Plaintiff in error executed and delivered an instrument in writing, of which the following is a copy:

"$321 00. STANTON, Mich., July 8, 1872.

"For value received, I promise to pay to the order of H. H. Smith, Esq., three hundred and twenty-one dollars, one year from the time when the railroad proposed to be built on some point on Detroit, Lansing and Lake Michigan Railroad, not more than five miles from the station of that company in Ionia, north to Stanton, shall be open, and

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trains shall pass over it to and from Stanton to said point of junction; the said road, under present or future to be formed organization, to be called 'The Ionia, Stanton and Northern Railroad;' provided work be commenced on said road within forty days, and that said trains are run thereon by the first of May, A. D. 1873.

"WILLIAM H. STEVENS."

This agreement was afterwards properly assigned to the defendant in error, who commenced an action in March, 1875, to recover the amount claimed to be due thereon.

The court found that H. H. Smith in July, 1872, was superintending the D., L. & L. M. R. R. Co., and was the active business man in building the Ionia, Stanton & Northern Railroad, and was president of both roads; that all the terms and conditions of the agreement, as to the time, manner, etc., of building the road, had been fulfilled, and that trains were running regularly over it to and from Stanton to the junction and Ionia station about the 28th of April, 1873. Judgment was rendered in favor of Corbitt for the principal, with interest thereon from April 28, 1873.

A question was raised as to the form and effect of the written assignment made by Smith; also, whether it could be said that trains were running regularly over the road while the engine had to back one way for want of a turn table at Stanton. We do not, however, find any error in the ruling of the court upon these, or some other questions that were raised, and we do not consider them of sufficient general importance to discuss them at present.

It was insisted that the organization of the company and building the road did not affect this agreement; that in order to entitle the plaintiff to recover, it must appear either that there was some promise or agreement to build the road, made to Stevens as a consideration for his promise, or that the company went on and built the road in reliance upon Stevens' promise to pay, and it is insisted that there was no evidence given tending to bring the case within either of these propositions.

Where a party promises to contribute in aid of such an

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improvement, in the absence of express conditions, it would be implied as a condition, that the road should be constructed and operated, and upon this being done within a reasonable time, where no time was fixed, the promise would then become operative and binding, and the party making the promise would not thereafter be at liberty to repudiate it. The fact that a company was organized to build the road at the time the promise was made, or that even in the absence of such a promise the road would have been built, would not be sufficient to defeat it. The mere fact that a company is organized to build a road does not necessarily insure the work being done, or so make it the duty of the company to commence work, or complete the road, that a promise to assist by voluntary contributions would necessarily be without consideration and void.

Many private enterprises, of a *quasi* public nature, already commenced, or in contemplation, are largely dependent upon private, voluntary subscriptions to carry on and complete the work. Where such a promise is made to some one necessarily connected with, or interested in the work being done, for the benefit of the company about to, or which may have undertaken the work, then, upon completion of the same, or upon the performance of the conditions upon which the promise was made, the liability of the promisor becomes complete. There are also cases where expense is incurred, or an obligation created under the promise, where a like liability would follow.

In all such cases the fair inference is, that the work was done, or the expense or liability incurred, in reliance upon the subscription or promise, and the person making the same would not be permitted thereafter to withdraw his offer. "In such case the question is not properly whether there is any consideration for the agreement, but whether there is any agreement at all."—*Underwood v. Waldron, 12 Mich., 90; Comstock v. Howd, 15 Mich., 242.* This question is fully discussed in *Underwood v. Waldron.*

The court allowed interest from the time the road was

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completed, viz.: April 28, 1873. There is no express promise to pay interest, and according to the express terms of the contract the principal does not become due until one year from the time the road proposed should be open and trains pass over it. This, under the finding of the court, would make the principal become due April 28, 1874. If Stevens was liable to pay interest at all, it could only be computed from this latter date.

It may be questionable whether under the facts in this case interest could be allowed except from the time a demand was made; and if none was made, then from the time of the commencement of the suit. In *Beardslee v. Horton, 3 Mich., 564*, it was said, "when credit is given for a specified or indefinite time, interest is not allowable in the absence of a special agreement to pay interest; but after the expiration of the time in the one instance, and a demand in the other, interest is allowed." At the time this agreement was given, the time when it would become due, if at all, was indefinite. True, there was a time fixed within which, if trains were not running, it never should become due, but within the limit there fixed the time was indefinite; it depended upon the happening of an event which might not occur at all, and if it did, was so uncertain that we think a demand should have been made, or Stevens, in some way, notified that the conditions had been performed, and that his obligation had become due and payable.

The plaintiff in the court below was, under the finding, entitled to recover the amount of the note, with interest thereon from the date of the commencement of suit. As to all over this amount, the judgment must be reversed, and affirmed as to the residue, the plaintiff in error to recover his costs in this court.

The other Justices concurred.

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Charles E. Ritson v. Thomas F. Dodge.

Purchaser under decree: Risk of decree being set aside: Bona fide purchaser. A purchaser under a decree must ascertain at his peril whether the decree was warranted or not; and though the time for appealing from the decree had expired when he purchased, he cannot claim immunity as a *bona fide* purchaser, from the effects of a subsequent order without notice to him, setting the decree aside as unwarrantably entered.

Specific performance: Oral contract: Delay: Showing of excuse. Where a bill is brought against heirs of an estate for the specific performance of an oral contract made with their ancestor thirty years before, the delay must be excused by a very satisfactory showing of facts.

Specific performance: Oral contract: Admissions: Announcement of intention not to perform. Admissions by the alleged vendor, of an agreement to convey, coupled with an asserted intention not to convey because of an act of waste committed by the vendee, are not very satisfactory evidence of the contract; and such an announcement of his intention not to fulfill the contract makes more culpable the laches of a long delay by the vendee in bringing his action.

Contract to purchase lands: Evidence: Possession: Wild land: Dispossession. Work done in raising crops on wild land partially brought under imperfect cultivation is not very conclusive as evidence of possession under a contract of purchase, especially not where it is shown that the party was once dispossessed of his occupation and a part of his crop appropriated by the alleged vendor.

Laches. One whose claims as purchaser have been thus by actual dispossession distinctly denied must move promptly in the assertion of any rights he claims thereafter.

Specific performance: Contract. It is essential to the granting of relief by specific performance that the contract be clearly and satisfactorily established.

Heard January 19. Decided April 11.

Appeal in Chancery from Van Buren Circuit.

E. R. Annable, for complainant.

Arthur Brown, for defendant.

COOLEY, CH. J:

The bill in this case was filed for the specific performance of a parol contract for the purchase of lands. The contract is alleged to have been made in 1844, between Daniel O. Dodge, the father of defendant, and Josiah Austin.

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Both these parties were deceased before this suit was instituted. It is averred in the bill that Austin took possession under the contract immediately after it was made, and continued in the actual, open and notorious possession until about the tenth day of April, 1865, making in the meantime valuable improvements on the land. Daniel O. Dodge died in 1863, and defendant, partly by descent and partly by purchase, has succeeded to his rights. Austin conveyed his rights to Lawrence Brewer in 1865, and Brewer in the following year filed a bill for specific performance, and took a decree in his favor in April, 1870. After this decree, and after the time for appealing therefrom had expired, complainant bought of Brewer. The decree was subsequently set aside as having been unwarrantably entered, and the case was heard on pleadings and proofs in the court below, and finally in this court on appeal, where the complainant's bill was ordered dismissed, on the ground that he had parted with his interest in the subject matter of the suit.—*Brewer v. Dodge, 28 Mich., 359.* The present suit was commenced in April, 1874.

It is insisted on behalf of complainant that, inasmuch as he bought of Brewer while a decree existed in his favor, and after the time for appealing had expired, the complainant is such a purchaser in good faith as cannot be affected by a subsequent order setting aside the decree, at least until after he has had notice and an opportunity to be heard. No authority is cited to this position, and we know of none for it. The decree was found to have been entered without authority, and there is no question before us but that, as between the parties thereto, it was properly set aside. A purchaser under a decree must ascertain at his peril whether the decree was warranted or not.

On the facts shown by the evidence the case is embarrassing. It could not be otherwise when it is borne in mind that the bill was filed thirty years after the alleged parol contract, and that the bill by Brewer, which constitutes the excuse for not filing this one earlier, was not filed until

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twenty-two years after the making of the contract, nor until after the alleged vendor was dead. Any attempt to establish a parol contract against the heirs of an estate after such a lapse of time must always be open to some suspicion, and ought to be excused by a very satisfactory showing of facts.

The showing regarding the contract consists in this case of admissions by the alleged vendor, the most of which seem to have been accompanied by a declaration of his intention not to convey the land, because of an act of waste committed by the vendee. This distinct announcement of his intention not to fulfill the contract, weakens considerably the evidence, not only because it suggests that he must have believed he had a valid defense, but also because, in thus making public his intention not to be bound, he was notifying the vendee of the necessity of his taking legal proceedings if he claimed rights, and thus rendering the subsequent delay fairly attributable to a belief that the party claiming as vendee had no rights which he believed could be enforced. The facts fairly suggest such an explanation of the delay; and though it may not be the correct one, yet the suggestion cannot fail to be of considerable influence in a case where a party is seeking to enforce an invalid contract on a showing of special equities.

The possession from the time of the making of the contract was not of a character to be much relied upon. The land was wild land, which was partially brought under imperfect cultivation, and the acts of possession consisted almost exclusively of work done in raising crops upon it. This may have been under a contract of purchase, or under some other arrangement. If under the former, Dodge may have believed it had never been performed so as to give Austin any rights. Whatever may be the real facts as to Dodge's claim, it is certain that in 1861, or before, he dispossessed Austin of such occupation as the latter had, and appropriated a part of the crop he had raised. It is difficult to conceive of a more distinct denial of Austin's rights

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as purchaser; and if he claimed any rights after that, he should have moved promptly in their assertion.

The improvements made by Austin were insignificant, and not of a nature to indicate clearly that they must have been made in the character of a vendee. Indeed, the whole evidence seems to us entirely too vague and uncertain to justify any interference with the rule of law which makes all such contracts void. The contract is not clearly made out, and we could not feel satisfactory assurance that in enforcing it we were enforcing a contract actually made, and upon which the vendor had received his consideration.

The previous decisions in this state, of *McMurtrie v. Bennette, Har. Ch., 124; Wilson v. Wilson, 6 Mich., 9; Bomier v. Caldwell, 8 Mich., 463*, regarding the proof necessary in these cases, and *Campau v. Van Dyke, 15 Mich., 372*, and *McVickar v. Filer, 31 Mich., 304*, regarding the effect of delay in moving to obtain equitable relief, are all we need refer to in support of the views expressed.

The decree must be reversed, and the complainant's bill dismissed, with costs of both courts.

The other Justices concurred.

The Michigan Midland & Canada Railroad Company v. Thaddeus W. Bacon.

Railroads: Voluntary subscriptions: Acceptance: Performance of conditions: Binding contracts. Voluntary subscriptions in aid of a proposed railroad, when accepted and the road completed in accordance with the conditions of the promise, become valid and binding contracts.

Parties: Promise to company, its successors or assigns: Consideration. Where the promise is to an existing company, its successors or assigns, the completion of the road by its successor, to whom it had assigned all its franchises and property, including such subscription, will enable the latter to enforce the promise in its own name; the building and opening of the road is the essence of the agreement.

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MICHIGAN MIDLAND & CANADA R. R. CO. *v.* BACON.

Voluntary subscriptions to railroad: Change of location. Though there might be such a change in the location of the line of the road as would warrant the person making the promise in withdrawing it, where it would be apparent that he would lose the advantages which he expected to accrue to him from the building of the road, the evidence in this case in that regard did not make out a valid defense on that ground.

Submitted on briefs January 19. Decided April 11.

Error to St. Clair Circuit.

The instrument sued upon in this case reads as follows:

"$100 ST. CLAIR, MICH., Oct. 10, 1871.

"For value received I promise to pay the Michigan Midland Railroad Company, its successors or assigns, the sum of one hundred dollars, sixty days after said railroad is open for traffic from St. Clair to Ridgeway Station.

(Signed) "T. W. BACON."

Atkinson Bros., for plaintiff in error.

Hoyt Post and *Ashley Pond*, for defendant in error.

MARSTON, J:

This case in its main features resembles and must be governed by *Stevens v. Corbitt, supra, p. 458*. It is further insisted in this case that the promise was made to the Michigan Midland Railroad Company, which never finished the road or opened it for traffic. That company, after the contract in this case was made, commenced the construction of the road, but being unable to complete the same, it made an assignment in November, 1873, to plaintiff in error, of that portion of the road referred to in the agreement of Bacon, together with all its franchises and property of, in and to said portion of the road, and a further assignment of the agreement sued upon was afterwards made. The plaintiff in error, therefore, became the successor and assignee in that portion of the Michigan Midland Railroad Company's road and franchises, including the agreement in question. Bacon promised to pay that company, its successors or assigns, and

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we know of no legal impediment in the way of enforcing the agreement which he made. From a reading of his agreement it would appear to have been a matter of small importance to him what corporation built the road and opened it for traffic, if it was only built and opened. It was the building and opening which was considered the essence of the agreement.

It is also suggested that at the time the agreement was obtained the road was surveyed and located about half a mile from defendant's farm, and that he said, at the time the note was given, he would aid in building the road on that account, but that the road was afterwards changed and built across his premises, which was a damage to him. There undoubtedly might be such a change made in the location of the line of a road as would warrant the party making the promise in withdrawing it, where it would be apparent that he would lose the advantages which he expected to accrue to him from the building of the road. We are not prepared to say, however, that the change in this case was of that nature. There was no such condition in the agreement itself. Indeed the court does not find that what was said upon that subject at the time of entering into the agreement was considered at all material, or was any thing more than a mere casual remark. Nor does it appear that defendant made any objections to the proposed change, or made any effort to withdraw his promise of aid on that account. Besides, if the change was any injury to him on account of running across his lands he had a remedy for such damages as he suffered thereby, independent of this agreement.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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Austin B. Webber v. John C. Donnelly.

Practice: Weight of evidence: Where there was evidence tending to sustain a fact found by the court below, his decision upon the weight of the evidence will not be reviewed.

Practice: Rulings that do not prejudice. Where an objection has been sustained to a question which was put with the view of establishing a fact which the court afterwards found in favor of the party who put the question, that ruling becomes immaterial, and will not be reviewed.

Contracts: Place: Order for liquors: Sale in another state: Presumption. Where an order is sent by mail from Detroit to Chicago, in pursuance of which intoxicating liquors are there shipped to the person giving the order, and are afterwards received by him at Detroit, the contract is an Illinois contract and presumably valid, and it is not affected by the Michigan statute.

Vendor's knowledge that vendee intends to make illegal use of goods sold. Mere knowledge on the part of the vendor, that his vendee at the time of the purchase of property intends to use it for an illegal purpose, will not prevent his recovering from the vendee the value of the property.

Heard January 20. Decided April 11.

Error to Superior Court of Detroit.

John C. Howland and *Maybury & Conely*, for plaintiff in error.

James T. Keena and *Atkinson & Atkinson*, for defendant in error.

MARSTON, J:

Donnelly sued Webber in assumpsit to recover the amount of a certain draft drawn by Enright & Kelly of Chicago upon Webber. The draft purported to have been accepted by one Henshaw. Defendant denied the authority of Henshaw to accept the draft, and denied any subsequent ratification of his act. The defense claimed that the plaintiff was not a *bona fide* holder, and set up failure and illegality of consideration as a defense.

In reference to the authority of Henshaw to accept the draft, the court below found that he had no such authority.

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The court, however, did find that the subsequent conversations and acts of Webber amounted to an assent or ratification of the act of Henshaw in accepting the draft, and that he thereby rendered himself liable the same as though he had himself written the acceptance. An examination of the record shows that evidence was introduced tending to show such ratification. Whether it was sufficient to establish that fact, is not for this court to determine. That question was addressed to the judgment of the court below, and the conclusion there arrived at as to the weight of the evidence is conclusive. It appeared that C. S. Parsons called upon the defendant, and presented the draft to him for payment. Upon cross-examination of this witness he was asked: "By whose authority did you call upon him?" This was objected to and sustained. This question was asked with a view to proving that the plaintiff was not a *bona fide* holder. The court, however, found that the plaintiff was not a *bona fide* holder of the draft, so that the ruling upon this question under the finding becomes immaterial. The same may be said of the question asked the witness Atkinson: "How did he [Kelly] come to turn it [the draft] over to you?"

The important question raised by the record, and relied upon in this court, yet remains to be considered.

It appears from the finding of the court that Messrs. Enright & Kelly, prior to and on the 22d of February, 1875, were co-partners, engaged in the business of selling spirituous and intoxicating liquors at wholesale in the city of Chicago; that the defendant Webber, at and during the same time, and until May, 1875, was engaged in a similar business in the city of Detroit; that on the 22d day of February, 1875, Webber, at Detroit, sent by mail to Enright & Kelly, at Chicago, an order for five barrels of whiskey, and that in pursuance of this order Enright & Kelly shipped the goods mentioned to Webber, delivering them to the Michigan Central R. R. Co. at Chicago, to be conveyed in the ordinary course by said company to defendant in Detroit; that the goods were so conveyed and received by defendant, and entered

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into and became part of his stock in trade, and that the same were spirituous and intoxicating liquors; that for a long time prior to the giving of this order Webber had purchased such liquors of Enright & Kelly; that in the customary course of dealing between the parties, contracts for the sale of such liquors by Enright & Kelly had generally been made by Kelly in person, at the store of Webber, and that Kelly had on several occasions been at the store of Webber when his liquors were sold, and knew his course of trade.

Upon the trial, defendant offered to show "that Enright & Kelly sold those liquors to Mr. Webber in the ordinary course of business transactions with Webber, and they knew that Webber was a dealer in spirituous and intoxicating liquors here, contrary to the laws of Michigan." This was objected to, the evidence excluded, and exception taken.

The contract entered into between the parties was made in the state of Illinois, and such a contract must be presumed to be valid in that state, no showing to the contrary having been made.—*Kling v. Fries, supra p. 275,* and *Roethke v. Philip Best Brewing Co., supra p. 340.*

Does then the fact of Enright & Kelly's knowledge at the time of the sale, that Webber was a dealer in spirituous and intoxicating liquors in Detroit contrary to the laws of Michigan, constitute a defense to an action brought to recover the value of the liquors so sold?

It has been held that where the plaintiff not only had knowledge of the illegal purpose of the defendant, but sold the liquors with reference to that illegal purpose, and to enable the defendant to effect it, he could not recover.—*Webster v. Munger, 8 Gray, 587.* Where the order for the liquors was given in Vermont but the sale completed in New York, the seller knowing that they were to be sold in violation of law, it was held that it must be considered as a sale made in Vermont, and that the plaintiff could not recover.—*Zerritt v. Bartlett, 21 Vt., 184.* Where an agent comes into the state where such sales are prohib-

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ited, and personally solicits the order, although the order then given may be so acted upon in another state that the contract will be held to have been entered into there, yet the plaintiff will not be entitled to recover.—*Wilson v. Stratton, 47 Me., 120.* Where the plaintiff forwards the goods to the defendant in a disguised form, erases marks upon the casks, packs the goods in a particular and unusual way to avoid detection, or does any positive act, beyond the mere fact of sale, in aid of the unlawful purpose, he cannot recover.—*Aiken v. Blaisdell, 41 Vt., 655; Holman v. Johnson, Cowp., 341; Clugas v. Penaluna, 4 T. R., 466; Waymell v. Reed, 5 T. R., 599.*

In most of these cases the vendor not only has knowledge of the illegal use to be made of the goods purchased, but he does some positive act to enable the purchaser the more successfully to violate the law of the country to which the goods are to be taken.

The undoubted weight of authority, however, holds that mere knowledge by the vendor that the vendee, at the time of the purchase of property, intends to use it for an illegal purpose, will not prevent his recovering from the vendee the value of the property.—See *Tracy v. Talmage, 14 N. Y., 162,* and *Hill v. Spear, 50 N. H., 253,* where the question is discussed in all its bearings, and all the authorities reviewed and commented upon.

While it is quite probable that no distinction should be made between contracts *malum in se* and *malum prohibitum,* yet in examining this question we must keep in mind the fact that the contract in this case does not come within the former class, and that there was no showing that it came within the latter either, where made. We cannot, therefore, apply the same reasoning in this case that we would to a contract *malum in se.* In one of the cases where this question has been discussed, the strong cases of selling arsenic, with the knowledge that it is to be used by the buyer to poison another, is put, and it is there said the vendor in that case could not recover the contract price of the arsenic. The conclu-

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sion there arrived at is unquestionably correct. He could neither recover in the country where the arsenic was sold, nor where it was carried to for the purpose of effectuating the unlawful intent and object. Such a contract would be void where made, and void everywhere. Here, however, the contract was a valid one where made, and it is not disputed but that they could, in an action brought upon the contract in Illinois, have recovered. I do not consider it necessary to discuss this case at length. It is very doubtful whether any thing new could be added to the very elaborate arguments in the two cases already referred to. I am of opinion that there is no error in the record, and that the judgment should be affirmed, with costs.

The other Justices concurred.

Owen M. Locke v. David McVean and another.

Contracts of guaranty: Construction: Intent of the parties. Contracts of guaranty are to be construed like other contracts, and the intent of the parties, as collected from the whole instrument and the subject matter to which it applies, is to govern.

Guaranty: Construction; Principal and surety: Guarantor and guarantee. But when an understanding is once reached of the true agreement, the rules and principles which pertain to the rights and duties of principal and surety apply, so far as appropriate to the form of that relation recognized in the case of guarantor and guarantee, or admissible in view of the nature and terms of the particular transaction.

Bonds: Written contract: Construction. A bond given to secure the performance of a written contract is to be construed as if the contract were copied into the preambles of the condition of the bond.

Guarantor: Promissory notes: Contract: Variance. One who has become guarantor for such notes of a specified description as another should give in pursuance of a written contract, cannot by virtue thereof be held liable for notes differing materially from those for which the contract provided.

Guaranty: Promissory notes: Variance: Discharge of guarantor. Where the contract, the performance of which is guarantied, provides for notes at four months without interest, to be renewed, if desired, for sixty days

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at eight per cent., the guarantor is not holden for notes running six months, with interest for four months at seven per cent., and thereafter at eight, nor for six months' notes with interest at eight per cent. after four months; the variance is a substantial one, as affecting the rights of a surety.

Heard January 20. Decided April 11.

Error to Oakland Circuit.

J. E. Sawyer and *George H. Lothrop*, for plaintiff in error, cited: *Farmers & Mechanics' Bank v. Kercheval, 2 Mich., 504; Hunt v. Smith, 17 Wend., 179; Dobbin v. Bradley, Ib., 422; Walrath v. Thompson, 6 Hill, 541; Smith v. Dann, Ib., 543; Salisbury v. Hale, 12 Pick., 419; Curtis v. Hubbard, 6 Met., 191; Lee v. Dick, 10 Pet., 493.*

A. C. Baldwin, for defendants in error, cited: *Milton v. Stewart, 9 Wheat., 680; Wright v. Johnson, 8 Wend., 576; Walch v. Bailie, 10 Johns., 180; Birckhead v. Brown, 5 Hill, 640; Whitcher v. Hall, 6 B. & C., 269; N. H. Savings Bank v. Colcord, 15 N. H., 122; Watriss v. Pierce, 32 N. H., 574; Bouser v. Cox, 4 Beavan, 379; Farmers & Mechanics' Bank v. Evans, 4 Barb., 487; Bigelow v. Benton, 14 Barb., 128; Henderson v. Marvin, 31 Barb., 299; Leeds v. Dunn, 10 N. Y., 469; Wilson v. Edwards, 6 Lans., 134; Bagley v. Clark, 7 Bosw., 94; Bangs v. Strong, 10 Paige, 11; S. C., 7 Hill, 250; Miller v. McCann, 7 Paige, 459; Frank v. Edwards, 8 Exch,, 214; Holland v. Lee, 9 Ib., 480; N. W. R. W. Co. v. Whinway, 10 Ib., 77; Stewart v. McKean, Ib., 675.*

GRAVES, J:

Locke and defendant in error, David McVean, entered into an agreement in writing on the 1st of March, 1871, of the following tenor:

"It is agreed that all sales of sewing machines which O. M. Locke, of Detroit, Mich., shall make to David McVean,

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of Lapeer, shall be upon the terms and conditions following, unless it shall be otherwise in writing hereafter agreed, during the continuance of this contract. All indebtedness by account, note or otherwise, which shall arise under this contract from said D. McVean to said O. M. Locke, shall be paid when due.

"*First.* Machines will be packed for transportation and delivered in Detroit by O. M. Locke, after which all expenses of every kind will be paid by said David McVean.

"*Second.* Said David McVean shall reasonably advertise and make all reasonable efforts to sell at prices not less than the regular retail prices of O. M. Locke, and shall introduce, supply and sell said machines as speedily, thoroughly and extensively as practicable throughout said Lapeer county, state of Michigan.

"*Third.* Said D. McVean shall neither keep nor deal in any other sewing machines than the 'Florence,' and shall supply himself, by purchase from O. M. Locke, with needles, threads and findings for said machines, that his customers and the community may be at all times promptly and conveniently supplied; and said needles, thread and findings shall be sold to him by O. M. Locke at the lowest wholesale price to such agents for cash.

"*Fourth.* O. M. Locke will, during the continuance of this agency, sell his machines to said D. McVean at a discount of twenty-five per cent. from the regular retail prices at Detroit.

"*Fifth.* Said D. McVean shall give to every purchaser of a Florence machine full and thorough instructions how to run said machine, and shall forfeit to O. M. Locke all profit or commission on such sale in case of failure or neglect to fulfill the requirements of this clause.

"*Sixth.* So long as said D. McVean shall conduct this business properly, energetically and to the satisfaction of O. M. Locke, no other local agent for the sale of said sewing machines will be established in said territory.

"*Seventh.* Said D. McVean shall give his note of hand

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for all purchases of machines, at the time of purchase, said notes to be on four months' time without interest. If so desired, an extension of time will be granted by O. M. Locke, equal to sixty days on each note, said McVean to pay interest therefor at the rate of eight per cent. per annum.

"O. M. Locke agrees to take good notes that said McVean may receive in exchange for machines, provided said notes are payable at bank or express office, bearing interest from date, on not over six months' time and endorsed by D. McVean. If not paid at maturity, said notes are to be returned to said D. McVean. If O. M. Locke shall not be satisfied with the conduct of said business and agency by said D. McVean, he may establish another agent in his stead at pleasure. Said D. McVean may discontinue this agency at pleasure, on notice of thirty days.

"For the more convenient prosecution of this agency, O. M. Locke agrees to furnish said McVean with a wagon, as soon as said McVean shall become satisfied that the territory will pay sufficiently well to justify the expense. Said wagon to be the property of O. M. Locke, and to be returned in as good order as received, 'natural wear excepted,' upon demand of O. M. Locke."

At the time this contract was entered into, a bond was written and executed on the back of it, from the defendant David McVean as principal, and the defendant Daniel McVean and one Alexander McVean, now deceased, as sureties, to the plaintiff Locke, in the penal sum of two thousand dollars, and conditioned that if David McVean should "well and truly keep and perform in all respects, according to its true intent and meaning," the contract in question, then the obligation should be void, otherwise in force.

Subsequently David McVean gave his five several promissory notes to Locke, each payable six months after date, and dated respectively May 17th, May 18th, September 22d, October 2d, and October 7th, in the year 1871, and each, except the second, only drawing interest after four months,

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and then at the rate of eight per cent. The second was so worded as upon its face to draw interest at seven per cent. from date for the first four months, and thereafter at eight.

The notes were all given for sewing machines furnished by Locke in the course of the business explained in the contract, and not being paid, Locke sued upon the bond to enforce collection of the surviving surety. When the case came on for trial, there was no dispute about the genuineness of the papers. The only question was whether the bond applied to and covered these notes. The contract and bond were admitted in evidence without objection, but the surety insisted that the notes were not such as he agreed to be liable for; that he only bound himself to be liable for notes given by David McVean to the plaintiff, and drawn payable at four months, whereas the notes offered were drawn payable at six months; and the judge sustained the objection and refused to admit the notes in evidence. The question in the case is upon the correctness of this ruling, and it turns upon the interpretation of the papers. In argument counsel laid down conflicting rules as to the interpretation of guaranties. For the defendants it was contended that the undertaking of the guarantor must be read and applied according to the strict letter or precise terms used to express it, and *Wright v. Johnson, 8 Wend., 512*, and several other cases, were cited.

On the part of plaintiff in error it was claimed that the same principle is to govern which obtains where other contracts are in question, and that the intent of the parties is to be sought for and may be gathered from the whole instrument and the subject matter of the engagement, and *Curtis v. Hubbard, 6 Met., 191*, and *Lee v. Dick, 10 Pet., 493*, were referred to.

Formerly it is certain there was much diversity of opinion on this subject. A number of New York cases were very strongly on the side of construction favorable to the guarantor and such as would reduce his liability within the narrowest limits. *Chancellor Kent* seems to have inclined

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to that doctrine.—*Com., Vol. 3, p. 124.* There were likewise some English authorities which favored the same view. But in *Mason v. Pritchard, 12 East, 227,* the court of King's Bench declared that the words were to be taken as strongly against the guarantor as the sense of them would admit of, and in *Merle and others v. Wells, 2 Campb., 413, Lord Ellenborough,* at *nisi prius,* acted on the same principle.

In *Hargreave v. Smee, 6 Bing., 244, Tindal, C. J.,* said: "The question is, What is the fair import to be collected from the language used in this guaranty? The words employed are the words of the defendant, the guarantor in this cause, and there is no reason for putting on a guaranty a construction different from that which the court puts on any other instrument. With regard to other instruments the rule is, that if the party executing them leaves any thing ambiguous in his expressions, such ambiguity must be taken most strongly against himself." *Park, J.,* observed, that it had been conceded that all these cases were to be decided each on its own ground; and that it was useless, therefore, to refer to the decisions, except for some principle incidentally laid down; that the only question of principle which had been agitated was, whether these instruments were to be construed strictly, and that he was not disposed to hold the doctrine which had been imputed to *Lord Wynford,* that a guaranty ought to receive a strict construction. *Burrough, J.,* remarked, that he hoped the time would come when more reliance would be placed on principles than on cases; that he had no doubt as to the intention of the parties; that the writings were commercial agreements, and ought to receive a liberal, not a strict construction. In *Wood v. Priestner,* in the Exchequer in 1866, the Chief Baron observed, the question in these cases depends not merely on the words; but, when the words are at all ambiguous, requires a consideration of the circumstances to aid the construction; that it was therefore necessary to look at the existing state of things, and looking to that, to construe the words in such a way

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as the court considered most consistent with the intention of the parties; not, indeed, considering any statement of either party as to what he meant by the words used, but taking the words themselves, together with the surrounding facts, as the exponents of the meaning of both. *Martin, B.*, observed, that he could not assent to the remarks of *Bayley, B.*, in *Nicholson v. Paget, 1 Cr. & M., 52*, that a contract of guaranty ought to be read in any peculiar way, and stated that his own opinion was it should be read in the same way as any other contract.

Bramwell, B., also repudiated the opinion of *Bayley, B.*, in *Nicholson v. Paget*, and thought a contract of guaranty should be interpreted in the same way as other contracts. *Pigott, B.*, concurred, and the judgment followed the rule as stated *(L. R., 2 Excheq., 66)*, and was affirmed in the Exchequer Chamber.—*Ib., 282.*

In *Burgess v. Eve* the Vice Chancellor remarked, that reason must be applied to the construction of an instrument of guaranty, and in view of the surrounding facts and the expressions, he proceeded to ascertain the import of the engagement by giving what he called a reasonable construction to the terms.—*L. R., 13 Eq. Cases, 450; 2 Eng., 379;* see also *Tanner v. Woolmer, 20 E. L. & E., 491; Northwestern R. W. Co. v. Whinray, 26 E. L. & E., 488; Bainbridge v. Wade, 1 E. L. & E., 236; Rolt v. Cozens, 37 E. L. & E., 261; Broom v. Batchelor, Ib., 572; Mayer v. Isaac, 6 M. & W., 605.*

In *Curtis and another v. Hubbard, 6 Met., 186, Chief Justice Shaw* observed, that in construing an instrument of guaranty, as in the case of any other written instrument, the intent of the parties is to govern, as collected from the whole instrument and the subject matter to which it applies.

In *Dobbin v. Bradley, 17 Wend., 422*, in *Gates v. McKee, 3 Ker., 232*, and in *Rindge v. Judson, 24 N. Y., 64*, the true rule was deemed to be, that when the question is as to the meaning of the written language in which a guarantor has contracted, there is no difference between the contract

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of a surety and that of any other party, and this seems to be the doctrine as now settled in New York. In the last case many authorities were cited and considered.

The view now generally received appears to be, that for the purpose of finding out what the contract is, the same course is to be pursued that the law authorizes to ascertain what the parties have agreed upon in the case of other mercantile contracts, but that when an understanding is once reached of the true agreement, the rules and principles which pertain to the rights and duties of principal and surety apply, so far as appropriate to the form of that relation recognized in the case of guarantor and guarantee, or admissible in view of the nature and terms of the particular transaction.

This subject has been examined because counsel on both sides appeared to attach importance to it; but according to my impressions the decision of the present case does not depend upon the adoption or rejection of any particular rule which ambiguous arrangements may be supposed to call for.

When the stipulations are plain on their face, so far as they concern the matter in dispute, there is no occasion to spend time about rules.—*Mayer v. Isaac, supra.*

The explicit description of the undertaking of the party can speak for itself, and if the question is, whether a particular matter equally specific is within it, there ought not to be great difficulty in deciding. As he who undertakes cannot be required to assume more than he promised, if the matter he is sought to be charged with is identically different in substance and effect, no nice reasoning is necessary to prove the want of liability of the promisor. And, on the other hand, if what is claimed is identically comprehended by the written description of the undertaking, there would seem to be no room for debate. The transaction here must be viewed as it would be if the contract between the plaintiff and David McVean had been copied into the preamble of the condition of the bond, and proceeding to read the bond in that way and comparing the notes in question with the defendant's undertaking in the obligation, I discover no

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ambiguity and find nothing uncertain. The parties contemplated two forms of indebtedness, one by notes given for machines, and the other for needles, thread and findings, for which notes were not expected to be given, and in the commencement of the agreement it was provided that David should pay such indebtedness when due. The notes there referred to were left to be described in a later provision, and in the seventh article we find them described. For every machine David was to give at the time of purchase his note on four months' time without interest, and in case he desired was to have an extension for sixty days, but for the time of the extension there was to be interest at the rate of eight per cent. Of course under this arrangement Locke would be entitled to the specified note on parting with the machine. No other or different notes were provided to be given by David to the plaintiff, and under the contract the plaintiff could not require any other. They would be a specific form of indebtedness, and very distinguishable from one resting upon verbal proof. As notes they could be negotiated and used in business and transferred so as to exclude objection or defense by the maker. The guaranty amounted to an obligation that such notes should be paid when due; but it was not an agreement that any notes which David might give, to run six months or six years, should be paid when due. It was of special interest to the guarantors that the time of running of the notes they were to be liable for should be fixed. If not fixed, then the time in each case would depend on the notions of the immediate parties, who might make it very short or extend it to years, and the guarantors would be always uncertain as to the length of time to which their liability might be carried. Every one must see the difference between becoming bound for all notes one neighbor may give another, on whatever time, and becoming bound for all notes so given having four months to run. It is common experience that men will often become sureties on three or four months' paper when they would not if the paper were drawn at six months.

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There are some definite circumstances which mark the difference in the risk, and there is always room for contingencies to enhance the risk.

But the main consideration is, the guarantors only undertook for paper of a specific description, only became bound to stand responsible for four months' notes, and the plaintiff and David had no power to extend the obligation to other securities.

The plaintiff's counsel contends, however, that in view of the clause for an extension on each four months' note for sixty days, the notes in question, though given for six months, were substantially equivalent to four months, extended as authorized.

I do not think so. Each note was to run four months without interest, and in case of extension, then to carry interest at eight per cent. per annum for the extended time.

As previously stated, the second note in question was worded to draw interest from its date for four months at seven per cent. and thereafter at eight.

Clearly this note was a great ways from being the same as one drawn pursuant to the plan covered by the guaranty, and then extended sixty days. A few figures will explain one marked difference in dollars and cents.

But a short computation and comparison will prove that neither of these notes, in regard to length of time or amount of interest, is in substance the same as if drawn for four months without interest, and extended sixty days with interest at eight per cent. during that period. In every case the time and amount are both greater. Other distinctions may be noticed. The legal right to compel reception of payment and the surrender of the paper is postponed an additional two months, and that excess of time is likewise afforded for transfer before maturity, and these are substantial differences.

Indeed, the variances are too marked to leave room for any serious question—*Russell v. Perkins, 1 Mason, 368; Birckhead v. Brown, 5 Hill, 634; Northwestern R. W. Co.*

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v. Whinray, 26 E. L. & E., 488; Walrath v. Thompson, 6 Hill, 540; S. C. 2 Com., 185; Skinner v. Valentine, 59 N. Y., 473; Hall v. Rand, 8 Conn., 560; Eames v. Carlisle, 4 N. H., 201.

The judgment should be affirmed, with costs.

The other Justices concurred.

Henry M. Snyder v. Lewis Willey.

Bills of exceptions: Notes of the whole trial. The practice of incorporating into a bill of exceptions the notes of the trial literally, without reference to whether they have any bearing on the law questions raised, is criticised.

Assignment of errors: Exceptions. An assignment of error, not supported by any exception, will not prevail.

Assumpsit: General issue: Evidence. Defenses to an action of assumpsit, going to the existence of any promise having legal force, are admissible under the general issue.

Evidence: Promissory notes: Illegal consideration: Fraud: Extortion. Where the defense is made to a suit upon a promissory note, that it was given in compromise of a criminal complaint against the maker's son-in-law and was procured through the entreaties of the daughter, whose fears had been played upon by the plaintiff with that purpose, it is competent to show what she stated to her father to induce him to give the note, as this was a part of the *res gestæ*.

Evidence: Objections. An objection to the inquiry put to defendant as a witness by his own counsel, as to what, if any thing, induced him to sign the note in suit, no ground of objection being given, is held not well taken, the inquiry being under the circumstances of no importance.

Evidence: Immaterial inquiries. The exclusion of evidence in relation to previous dealings between plaintiff and defendant's son-in-law, not connected with the transactions out of which the consideration for the note in suit was claimed on the one side to have grown, nor with the criminal prosecution, to compromise which the other side asserted the note was given, is held not to be error.

Assignment of errors: Record. Allegations of error which the record as returned does not support, will not prevail.

Evidence: Motives: Facts. The exclusion of the inquiry, put to the plaintiff as a witness by his own counsel, whether the settlement in which he received the note in suit, was made with a view on his part of compounding any felony or settling any criminal offense, or only for the purpose of securing his just debt, is held, under the circumstances of this case, all the surrounding facts having been proved, not to be error.

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SNYDER v. WILLEY.

Promissory notes: Consideration: Suppression of criminal proceedings. A promissory note given in consideration of the suppression of proceedings under a criminal complaint, is void in the hands of the promisee who was a party to the illegality, and he cannot enforce collection of it.

Contracts: Illegality of consideration: Complete defense: Restitution. Illegality of consideration is a complete defense to the entire contract, though the consideration be in part valid; and it is admitted as a defense, not to benefit the defendant, but to protect courts of justice from being made instruments to compel the execution of a contrivance to violate the law; nor will it be made a condition that restitution be made to the plaintiff of that part of the consideration which is legal; but the law leaves the parties where by their willful violation of it they have voluntarily placed themselves.

Submitted on briefs January 20. Decided April 11.

Error to Ionia Circuit.

Vosper & Wilson, for plaintiff in error.

Mitchel & Pratt, for defendant in error, cited: *Inhab., etc., v. Eaton, 11 Mass., 375; Moore v. Adams, 8 Ohio, 372; Pepper v. Haight, 20 Barb., 429; Foote v. Emerson, 10 Vt., 344; Browing v. Morris, Cowp., 790; Fay v. Oatley, 6 Wis., 42; Keir v. Leenan, 9 A. & E., N. S., 371; Seiber v. Price, 26 Mich, 579; Hacket v. King, 6 Allen, 58; Osburn v. Robbins, 36 N. Y., 371; Roll v. Raguet, 4 Ohio, 400; Moore v. Adams, 8 Ohio, 372.*

GRAVES, J:

Willey and his son-in-law, one Warner, made their joint and several promissory note to Snyder for two thousand dollars, and payment being refused when it matured, Snyder brought this suit against Willey upon it. Willey defended, and the essence of his defense was, that a material part of the consideration was the stifling of two criminal prosecutions (of which one was for forgery), commenced at Snyder's instance, and then pending against Warner. The jury returned a general verdict for Willey, and likewise returned answers to a large number of special questions. Judgment being entered against Snyder, he brought error, and the

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case is before us on a voluminous bill of exceptions, which has been fully inspected. It is seriously objectionable on account of its length and method. There are about two hundred folios of testimony, when all that was in the least needful might have been set down in less than fifty. An unreasonable expense was thus caused, and the labor of review largely enhanced. It would appear that notes of the trial were literally incorporated, without reference to their needfulness for the purpose of decision here, and as evidence of the want of care shown in drawing up the bill, we observe that at the foot of the testimony it is stated that "this was all the testimony given in the case," whereas it appears, but a few folios back, that the plaintiff, in answer to explicit questions by defendant's counsel, testified that he heard Mr. Marble testify in the cause the day before, and yet no such testimony, or any testimony of Mr. Marble, appears in the bill. We have had frequent occasion to express our disapproval of similar improprieties in practice. It is not alone that they increase the labor of the court; they unduly magnify the expense, and obscure and mystify the case, and make way for misapprehensions and injustice. It may possibly become necessary to apply some sort of penalty in order to repress such prejudicial irregularities.

It seems proper, in the first place, to gather from the record the material points in dispute. This is the more important because there is considerable matter not able to affect the result, and some which has a mere incidental bearing.

That the paper sued on was given by defendant to plaintiff, was not questioned. The objection was, that it never had any validity; and in substance the theory of the defense was, that Warner had pledged to Snyder a quantity of small notes, having a face value of some two thousand four hundred or two thousand five hundred dollars, on which Snyder had advanced some five hundred or six hundred dollars; that in these circumstances Snyder made a criminal complaint against Warner, and charged him with

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having forged one of these notes, and caused him to be arrested for examination on the complaint; that Snyder then proceeded to practice on the fears of Warner, Willey and Willey's daughter, Mrs. Warner, and made threats to her to cause her to solicit and influence her father, the defendant, to step forward and become a party to a settlement on exorbitant terms prescribed by Snyder; that defendant, being moved by such arts and means, met Snyder and received and offered terms of settlement; that Snyder's demands were considered too extravagant, and the parties separated without agreeing; that Warner was then placed in jail under the warrant on Snyder's complaint, and was bailed out in a day or two by defendant's means; that Snyder then made a second and different charge against Warner on another of the notes, and caused a warrant for his apprehension to be placed in the hands of the sheriff, and still signified his purpose to push his advantage and pursue Warner to the penitentiary unless a satisfactory settlement should be made; that whilst this warrant was out, and before arrest under it, a general adjustment was agreed upon and in the main carried out; that one branch of it was, that Warner and his father should give their note to Snyder without defendant's knowledge for about two hundred and ninety-four dollars, which was done; that the other branch of it was, that Snyder should telegraph the sheriff to abstain from coming and arresting Warner on the second complaint; that he should surrender the notes he held and stop the criminal proceedings; that they should stand settled; and that Warner and defendant should give the note in suit upon such consideration; that Snyder telegraphed, or was understood to have telegraphed the sheriff as agreed; that he surrendered the notes, and that Warner and defendant gave the note in accordance with the understanding; that shortly afterwards the sheriff appeared and made the arrest on the second complaint, but that in fact the proceedings in both cases were stopped, the plaintiff refusing to appear, and paying the costs; that the note for about

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two hundred and ninety-four dollars was subsequently paid; that it was expressly understood when the note in suit was given that it was to settle the whole matter, including the criminal proceedings.

The evidence in favor of this theory was very strong.

The plaintiff's position was not essentially different except in two particulars.

First, He insisted that the small notes surrendered amounted, according to their face value, to two thousand four hundred and fourteen dollars and some odd cents; that they were not pledged to him, but were entirely his by purchase from time to time of Warner, and that he gave Warner about eighty cents on the dollar for them, partly in cash and partly in notes he held against Warner.

Second, That in settling and getting the note from Warner and his father and the note in suit, the criminal matters were not taken into account, and that nothing beyond his civil claim was embraced.

In testifying he admitted he instituted the criminal proceedings, and claimed that the note about which he first complained was a forgery, and at the same time admitted that this very note, and that also on which he based his second complaint, were amongst those he surrendered. He likewise admitted that this surrender of the notes, and the settlement which embraced such surrender, and also embraced the giving the note in suit, actually occurred whilst the criminal proceedings were pending, and that at the very time of making the settlement he telegraphed the sheriff not to come and make arrest on the second complaint. He further testified that shortly after Warner's arrest on the first complaint he met him at Somer's store, and that Warner told him he wanted it fixed up, that he did not want to go to Ionia, and that he (Snyder) replied, "If you want to fix it up, we can do so;" that an interview then occurred between plaintiff and defendant, and that defendant made two propositions to settle, one being that he would take the notes if he (Snyder) would throw off ten per cent., and that he

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(Snyder) declined each proposition; that shortly afterwards, and after Warner had been bailed out of jail, he (Snyder) met him on the sidewalk and said to him: "I was kind of sorry that I did not make the old man another offer after I came home; I was sorry I did not offer to split the difference and throw off five per cent. and settle the thing up," and that Warner replied: "We will do it; I will go over and see the old man and fix it up;" that after the second warrant was out, Warner told him he would "fix that thing up in some way," and thereupon the final interview was at once brought about at which the business was concluded; that previous to this, however, he (Snyder) informed the prosecuting attorney "that Warner wanted to settle it up," and that this officer instructed him "not to give any writings to settle a criminal process," but that he might do so in civil matters, and that he gave no writings at all. He testified further, that on the settlement he told Willey "he would not appear on the return day" against Warner, "and dropped it," and that it was dropped; that there was from first to last much controversy about terms; that Warner was to pay the costs incurred in the criminal proceedings, but failing to do so, he (Snyder) had to pay them.

He did not deny having made threats as to what he would do against Warner if no satisfactory adjustment was reached, and reluctantly admitted he meditated sending him to the state prison unless a settlement was obtained.

With this explanation we proceed to consider the assignments of error, and we may first examine those relating to rulings on evidence. It is first assigned for error that the court erred in admitting Warner to testify in regard to transactions between him and plaintiff which were prior to the making of the note in suit, for the reason that the plea did not authorize it.

It is a sufficient answer to say that no exception was taken. But if there had been it would have been without force. The matter referred to was simply introductory, and

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the basis of the objection as explained at the time, that the notice accompanying the plea alluded to no former transactions or to the borrowing of any money, was fallacious. The defense was directed to the very existence of a promise having legal force, and this was admissible under the general issue alone.—*Gould's Plead., ch. 6, pt. 1, § 47.* In an anonymous case in *6 Mod., 230,* the court say a *feme covert* may plead non-assumpsit and give the coverture in evidence "because coverture makes it no promise." And our own cases are decisive to show that the defense was admissible under the general issue prescribed by statute.—*Kinnie v. Owen, 1 Mich., 249; Agent of State Prison v. Lathrop, Ib., 438; Myers v. Carr, 12 Mich., 63; Taff v. Hosmer, 14 Mich., 309; Dean v. Chapin, 22 Mich., 275; Wilson v. Wagar, 26 Mich., 452; Young v. Stephens, 9 Mich., 500.*

The second assignment charges error in allowing Warner's wife to state the conversation between herself and her father, the defendant, at his house.

This assignment is not warranted by the record. She was expressly confined to what she said to her father, and conversations "between" her and her father were excluded. She was only allowed to state what she told him to induce him to act, and it was manifestly adduced as one of the pieces of evidence to sustain defendant's theory, that the plaintiff made use of means to excite and frighten the daughter and cause her to influence her father, the defendant, to step forward and save the husband and son-in-law, Warner, from the plaintiff's toils.

She had just testified that immediately before going to her father the plaintiff had told her that the best thing her husband could do would be to settle, and that he, the plaintiff, would send her husband to Jackson unless he did settle, and that he had then got a second warrant for him. Under these circumstances what she told her father, to incline him to act, was part of the transaction. Its admission was not improper.—*1 Green. Ev., 108; 1 Stark. (by Shars.), 79, et seq.; Goodwin v. Harrison, 1 Root, 80; Phelps v. Foot,*

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1 Conn., 387; Park v. Hopkins, 2 Bail., 408; Hadley v. Carter, 8 N. H., 40.

The third assignment alleges error in permitting defendant's counsel to ask him what, if any thing, induced him to sign the note.

The defendant answered that his inducement was to get his son-in-law clear from that position; that he had no other object in view, and never received a dollar. On making objection to the question, no ground or reason was given, and none has been intimated here. Considering the tenor of the testimony on both sides, and even that given by the plaintiff, the inquiry would seem to have been of no importance, and as counsel have omitted to hint at any basis or theory to maintain the exception, it is believed to lack merit.

The fourth and fifth assignments are so plainly without force as not to deserve notice. The sixth complains because Warner was allowed to testify concerning the giving of the note by himself and father for two hundred and ninety dollars or two hundred and ninety-four dollars. There is nothing in this point. This subject was a branch of the defense. It was one of the marked features of the complete transaction, and without proof of it the jury could not have seen the transaction as it was.

The seventh allegation of error charges that it was improper to stay Hunt, a witness for plaintiff, from testifying that as plaintiff's agent he had bought notes of Warner during the time plaintiff and Warner were dealing together, inasmuch as the court had allowed defendant to place before the jury his view of such transactions and dealings. The allegation of error is not quite in keeping with the record, and does not fairly represent the action of the court. The exact extent of the ruling was to preclude Hunt from testifying in regard to other notes than those connected with the transaction. He was not prevented from swearing that he bought for plaintiff any or all of the notes in question, or from stating any thing he knew about Snyder's buying them, and

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in fact he testified at some length on this subject, and to the effect that the notes were bought and not pledged. When the point was raised below by plaintiff's counsel on which this charge of error is based, it was expressly stated there was no purpose to show by the witness that he bought any of the notes in question. If Hunt, acting as plaintiff's agent, had previously bought other notes of Warner, it had no tendency by itself to show that the notes connected with the transaction were also bought, and there was no offer of proof that Warner in such dealing with Hunt made any statement or admission leading, or helping to lead to any inference that the two dealings were similar. But the issue made in evidence, as to whether the notes connected with the transaction were pledged or sold to plaintiff, was immaterial, except as the event of it might bear on the credit of witnesses, and on the probability that there was or was not a reasonably adequate consideration in the view of the parties for the papers given to the plaintiff on the settlement, without including the suppression of the criminal proceedings. As the case stood, and in view of the facts sworn to by the plaintiff himself, it would be going very far to say that the remote influence just mentioned could have been produced through the testimony called for from Hunt. But however this may be, and waiving the fact that the allegation of error does not truly apply to the record, and departs from the requirement of the rule, the ruling itself under the circumstances was not illegal.—*1 Green. Ev., § 448; 2 Ev. Poth., 283; Com. v. Jeffries, 7 Allen, 548; People v. Kennedy, 32 N. Y., 141.*

The eighth allegation charges that the court erred in striking out testimony given by the plaintiff on his redirect examination in relation to his good faith and intentions in making complaint before the justice. In the first place it does not appear that there was any thing of the kind in connection with the redirect examination. But at any rate the plaintiff was allowed full liberty to testify as to his good faith and intention in making complaint, and he actually

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testified at length on the subject. There is no foundation for the assignment.

The ninth charge of error complains that the court improperly overruled the following question put to the plaintiff: "In settling with Mr. Warner and Mr. Willey did you make that settlement with a view of compounding any felonies or settling any criminal offense, or was it for the purpose of securing your just debt?"

An allowance of this question would not, except on account of its leading character, have been illegal, but it is a very different matter whether its rejection can be made a ground of complaint. On its face it was a little ambiguous, because the plaintiff may very well have had an ultimate purpose quite apart and remote from the relief of Warner from his peril of criminal prosecution.

The plaintiff had just previously testified to his talk with both Warner and Willey in regard to settling, as already mentioned, to the circumstances of the settlement, to his interference to prevent the service of the second warrant, and that in making complaints and suing out the warrants he acted in perfect good faith. He had also been asked by his counsel, whether in settling he was "settling a criminal prosecution or settling for these notes," and in answer to the question had sworn that he "was settling for these notes." And immediately after the excluded inquiry he swore, after hesitation, that when the warrants were procured he meant to send Warner to state prison unless he settled, and that he informed Willey at the time of the settlement that he "would not appear against" Warner "at the return day," and "dropped it."

Viewing the course of his examination, and his way of answering, and the answers given, there was strong reason for expecting that in responding to a question shaped as this was he would return an equivocal answer, an answer reflecting his notion of his final purpose in the transaction, as distinguished from his purpose or intention touching the means to bring about his final purpose. The question was

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not so framed as to confine him to his purpose or intention in the latter sense, and it was not important to press an examination in respect to the other.

One may resolve that he will get money from another, and such determination may imply nothing wrong. The end may be all right, or at all events not unlawful, and in a certain sense the separate fact of getting the money may be said to be the purpose or intention of the person resolving to get it. But the choice of means may carry with it an intention to rob or do some other illegal thing, and the important inquiry concerning purpose or intention, where the ultimate object is not necessarily wrong, relates to the purpose and intention connected with the means contemplated or adopted.

After a critical examination of the evidence, and especially the testimony given by the plaintiff himself, it is not perceived that the ruling objected to affords him any ground of legal complaint. In point of fact, he did testify in relation to the very subject to which the inquiry pointed, unless we assume the question was framed artfully and so that the witness would catch in it an opportunity to return a misleading reply.

The rulings about admitting evidence being disposed of, the charges of error based on instructions and refusals remain to be noticed, and this branch of the case is not entitled to much discussion. Considering the plainness of the evidence, the physiognomy of the defense developed, the form and inaptness of the requests refused, and the tenor and bearing of the instructions given, it would be a waste of time, in view of the findings by the jury, to examine the exceptions in this part of the case in detail.

The plaintiff has no just cause for complaint, since if the instructions were in any respect objectionable, they were at least sufficiently favorable to him, and the requests refused were either defective in frame or inapposite. The substantial and main defense, as developed by the trial, was, that part of the consideration of the note was the suppression of the

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criminal prosecutions against Warner, of which one was for forgery, and the evidence given by the plaintiff would have warranted a finding that this defense was true. But defendant urged as further matter of defense, that Snyder caused the commencement of such proceedings and the arrest of Warner for the very end and purpose of procuring, through their pressure and influence, a private pecuniary gain or advantage, and that the obtainment of the note was within such scheme and intention.

In view of the evidence and instructions, the general verdict must have been construed as a finding in favor of one or both of these grounds of defense, and in any event must therefore have been decisive.

Still there would have been nothing to enable the court to say whether the jury found for the defendant on both grounds, or, if not, upon which one of the two.

The answers by the jury to particular questions have, however, removed all uncertainty on this subject. They are in perfect harmony with the general verdict; and not only so, but they distinctly negative specific positions of the plaintiff, and categorically affirm the essential elements of both grounds of defense.

They say the plaintiff did not buy the small notes of Warner; that the prosecuting attorney did not assume control of the criminal proceedings, but did direct their discontinuance; that he did not inform plaintiff that he might settle his private damages, or to that effect; that the note in suit was given by defendant in consideration that plaintiff would surrender to Warner the small notes and forbear to prosecute the criminal proceedings; that plaintiff procured the warrants to be issued to obtain pecuniary satisfaction or some advantage to himself, and that these prosecutions were used by him to procure defendant's signature to the note in suit, and that the stopping the criminal prosecutions was understood as entering into or forming part of the consideration, or as inducement to the execution of the note.

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The findings settled beyond all question, that the writing sued on was based in part on an illegal consideration, and hence was not enforceable by the promisee, who was party to such illegality. Among the multitude of cases bearing on illegal arrangements, we cite the following, and they are quite sufficient for the present purpose.—*Collins v. Blantern, 2 Wils., 341,* and *2 Smith L. C., 153, and note; Holman v. Johnson, Cowper, 341; Benyon v. Nettlefold, 2 E. L. & E., 113; Hall v. Dyson, 10 E. L. & E., 424; Pearce v. Brooks, L. R., 1 Exch., 213; Ayerst v. Jenkins, L. R., 16 Eq., 275; 6 Eng., 756; Armstrong v. Toler, 11 Wheat., 258; Hanauer v. Doane, 12 Wall., 342; Trist v. Child, 21 Wall., 441; Orr v. Lacey, 2 Doug., 230; O'Hara v. Carpenter, 23 Mich., 410; Briggs v. Withey, 24 Mich., 136; Seiber v. Price, 26 Mich., 518; Steuben County Bank v. Mathewson, 5 Hill, 249*; *Sherman v. Barnard, 19 Barb., 291; Rose v. Truax, 21 Barb., 361; Peck v. Burr, 10 N. Y., 294; Knowlton v. The Congress and Empire Spring Co., 57 N. Y., 518; Atwood v. Fisk, 101 Mass., 363; Taylor v. Jaques, 106 Mass., 291; Clapp v. Hale, 112 Mass., 368; Sturges v. Bush, 5 Day, 452; Treat v. Jones, 28 Conn., 334; Shaw v. Spooner, 9 N. H., 197; Clark v. Ricker, 14 N. H., 44; Carleton v. Bailey, 7 Foster, 230; Roll v. Raguet, 4 Ohio, 400; Widoe v. Webb, 20 Ohio St., 431; Bush v. Brown, 49 Ind., 573;* see also § *7672, C. L.*

An argument of much length is submitted in the brief of plaintiff's counsel, to the effect that as part of the consideration for the defendant's promise sought to be enforced was the surrender of the small notes to Warner, it was not competent to bring forward the defense that the rest of the consideration was illegal, without its being shown that the small notes had been returned or offered back, and the argument seems to proceed on the assumption that the defense of illegality supposes or requires a rescission of the unlawful engagement by the party defending; and that his retention of the lawful part of the consideration must

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be considered as conclusive evidence of an election not to rescind, and hence an election to abide by the engagement.

The authorities cited expose the fallacy of this position, if indeed any authority was needed.

The plaintiff voluntarily became a party to an illegal agreement, and accepted a promise the consideration for which was in part this very illegality.

He chose to become promisee of the defendant where the consideration for the promise was the stifling of a criminal prosecution and the surrender of notes. He gave up the notes at once, and seems to have been faithful to his unlawful agreement concerning the prosecution. The defendant's promise has remained unexecuted, and the plaintiff now asks the court to compel him to perform, and insists that the court must do so, inasmuch as the defendant keeps the legal part of the consideration. The point is, that the law must help the plaintiff out of the consequences of his illegal conduct, and save him from loss, in one way or another. It must either award him the amount of the note, or by a rule of proceeding at least bring back to him all of any value he chose to part with to obtain the note.

The defendant might have voluntarily kept his promise, and if he had the whole arrangement would have been executed on both sides. But the transaction was never enforcible by action. The instrument the plaintiff accepted was in form a promissory note, but in the eye of the law it never had any legal force.

Being tainted by the illegal consideration, its fitness and capacity to be enforced depended on no other contingency than proof regularly made of the vice in it.

The defense in question is not admitted in order to benefit the defendant, but to protect a tribunal established to uphold the law from being made an instrument to compel execution of a contrivance to violate the law.

The very nature of the defense negatives the existence of any thing to be rescinded, and hence the entertaining of it depends in no manner upon any supposed duty resting on

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one of the culpable parties to restore any thing to the other, and the court can never recognize any rule by which the plaintiff must either have an enforcement of the promise made to him or else be put back where he was before he acted in furtherance of his illegal agreement.—*Brownell v. Talcott, 47 Vt., 243.*

The judgment should be affirmed, with costs.

The other Justices concurred.

The People on the relation of The County of Barry v. The Supervisors of Manistee County.

Claims against a county: Supervisors: Claim of one county against another. The constitutional provision (*Art. X., § 10*) conferring upon the board of supervisors "the exclusive power to prescribe and fix the compensation rendered for, and to adjust all claims against" a county, covers the claim of another county for the expenses of a criminal trial on a change of venue; and any action by the board of the claimant county, in auditing claims for such expenses, would be inoperative to bind the respondent county.

Supervisors: Claims against county: Rescinding previous action. Where the supervisors of a county against which such a claim has been presented have taken action upon it under the erroneous supposition that a previous allowance by the board of the claimant county was binding, and afterwards rescinded such action and investigated the items and passed anew upon the claim, their later action will not be reversed by *mandamus*, in the absence of a clear showing that the claim as at first allowed by them was just and right.

Submitted on briefs January 21. Decided April 11.

Application for *mandamus*.

This is an application to require respondents to cause an order to be drawn on the treasurer of their county in favor of the relator for the sum of three thousand two hundred and seventy-five dollars and five cents, on account of an allowance made by them of the claim of Barry county for the expenses of the trial of George Vanderpool for the mur-

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der of Herbert Field in Manistee county, which trial was held in Barry county under an order for a change of venue. The bill presented to the supervisors of Manistee county for their action was as follows:

For summoning 124 jurors	$186 00
For mileage and daily attendance of jurors and talesmen.	1,988 20
For balance of board bill of jury	94 50
For procuring witnesses for respondent by order of court	400 00
For subpœnaing witnesses for people	132 33
For attendance of officers on court and jury	438 50
For ice used during trial	5 25
For stationery and blanks used in said trial	5 00
For boarding Geo. Vanderpool while in Barry Co. jail.	79 50
For medical services for Geo. Vanderpool while in jail.	15 00
For boarding wife of Geo. Vanderpool in jail while he was sick	13 50
Total	$3,357 78

Several of these items had been presented to and allowed by the supervisors of Barry county before their payment by that county.

A conference was had between representatives of the two counties and it was arranged to have the claim allowed at the sum of three thousand two hundred and seventy-five dollars and five cents; and the supervisors of Manistee county at the October session, 1872, accepted and adopted a report of their committee that the claim be allowed at that sum and an order be drawn for the same; and at a special meeting in May, 1873, authority to draw such an order, with interest from January 1, 1872, was given to their chairman and clerk. This order, however, not being drawn, in October, 1874, the supervisors of Manistee county rescinded the allowance of the claim, and afterwards wholly repudiated and rejected the claim. Demand for such order having been thereafter made and refused, this application is made for *mandamus* to compel it.

Charles H. Bauer and *Hughes, O'Brien & Smiley*, for relator.

A. J. Dovel and *C. A. Kent*, for respondents.

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COOLEY, CH. J:

Under the constitution, *Art. 10,* § *10,* the boards of supervisors of the respective counties have "the exclusive power to prescribe and fix the compensation rendered for, and to adjust all claims against" their respective counties, with an exception in the case of the county of Wayne. This provision clearly covers the claims in question, and it must follow that the board of supervisors of Barry were acting without authority when they assumed jurisdiction to pass upon them. It is probably true, as was suggested in argument, that this conclusion must cause some inconvenience in cases like the present, but if so, the courts are powerless to give any remedy.

The allowance of claims by the board of supervisors of Barry county being thus found inoperative, the question presents itself how far the supervisors of Manistee are concluded by the action taken by their predecessors. Had that action been suffered to remain unrescinded, the question might perhaps be different from what it is now. It is very clear that a large portion of the claim presented by Barry county was such as could not be presented in its name at all, unless as assignee of the original claimants; and in any case, by whomsoever presented, would require to be put in such form as to enable the auditing board to pass upon the items. It is a fair inference from all the action taken, that the supervisors of Manistee at first supposed there was some force to the allowance already made in Barry county; and if they took action on that erroneous supposition, we do not see how they are to be estopped from rescinding it and insisting upon their undoubted right to investigate the items. At any rate, as they have done this, the court cannot with any propriety issue a *mandamus* which in effect reverses their action, unless it has very clear evidence that the claim as once allowed by them is just and right. We have no such evidence, unless the allowance by the supervisors of Barry county can be considered evidence in their own favor,

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and we do not think it can. The *mandamus* must therefore be denied.

We have assumed in what has been said that the statute which charges the county in which the case originated with the expenses applies to this case; no question having been made by counsel on that point.

The other Justices concurred.

William H. Moote v. John Scriven.

Contracts: Time: Delay: Reasonable time: Equitable relief. Where one has received the title of a purchaser upon a statutory foreclosure under an arrangement with the owner of the equity of redemption to give him further time to redeem or to purchase back, time is not so far of the essence of the contract as to prevent its enforcement upon equitable terms within a reasonable time after the lapse of the period specified.

Terms of granting equitable relief after delay: Interest. And where the arrangement was to pay twelve and a half per cent. interest to cover original expenses and trouble, and the extra two and a half per cent. did not exceed $30, payment in accordance with this arrangement was imposed as terms of granting the relief sought.

Specific performance: Oral agreement: Part performance. A verbal agreement to advance money to purchase lands and to remove incumbrances on them, and ultimately to transfer them to another on repayment, where the latter was all the time in possession, and did no act to his own prejudice which would amount to part performance, will not be specifically enforced in equity.

Foreclosures: Chancery sales: Purchaser: One holding relation of mortgagee: Previous equities. One who has received the title to lands under an arrangement which in legal effect made his rights no more than those of a mortgagee, is not thereby precluded from becoming a purchaser at a chancery sale on the foreclosure by a third person of another mortgage, and holding the title like any other purchaser; and such a purchase would cut off all previous equities of the other party.

Chancery appeals: Testimony taken in open court: Stenographer's notes. The stenographer's transcript of his notes of the evidence in a chancery cause where the testimony was taken in open court, which has been merely filed in the cause and a copy thereof sent up with the return without being authenticated by the circuit judge as a case settled as required by the statute, will not be considered on appeal as the evidence in the cause.

Heard April 4. Decided April 11.

Appeal in Chancery from Clinton Circuit.

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MOOTE v. SCRIVEN.

This cause coming on to be heard on appeal at the October term, 1875, of the supreme court, it appeared that the testimony was taken in open court, and that what was returned and treated as the evidence in the cause was but a copy of the stenographer's transcript of his notes of the evidence, which was merely filed in the cause and had been sent up with the return without being in any way authenticated as a case settled as required by the statute. This the court declined to consider as the evidence. And no case having been settled, and the statutory period having elapsed, the appeal was dismissed with leave to move for a rehearing at the circuit. A rehearing having been granted, the cause was again brought up on appeal, with the evidence properly settled and authenticated, and was heard on the merits at the April term, 1876.

H. Walbridge and *J. O. Selden*, for complainant.

O. L. Spaulding, for defendant.

CAMPBELL, J:

Moote filed his bill to redeem from Scriven two parcels of land in Clinton county, one being the northeast quarter of section eighteen, and the other the southwest quarter of the southeast quarter of section seven, in town seven north, of range two west. The bill claims that Scriven's interest is only a mortgage interest, and offers to repay the amount due.

The equities concerning the two lots are not identical, although asserted as arising under a single train of dealings. The court below held that a right of redemption existed in the parcel of forty acres on section seven, but not on the rest. It will be proper to deal with this first.

On the 6th day of May, 1871, the redemption of this lot was running out on a statutory foreclosure of a mortgage controlled by Josiah Upton. Upton had made a partial arrangement to transfer his title to Samuel S. Walker and

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one Cutler, but on the application of Moote, and for his advantage, he agreed to transfer it to Scriven, who was to give Moote time upon it. Scriven paid one thousand two hundred and ninety-eight dollars and ninety-four cents to Upton, besides some expenses, and received conveyances which gave him title in fee simple. He agreed to wait on Moote, as he says, one year, and as Moote claims, indefinitely, in consideration of twelve and a half per cent. to cover interest and expenses. Scriven claims the transaction was an agreement for a resale.

There is some difficulty in supposing that Scriven or Moote understood this to be a mortgage, in the proper sense of the term. No obligation rested on Moote to repay Scriven's advances, and he retained possession of the premises and used all that he got from them for his own advantage, without ever accounting for either principal or interest. No payment was ever made to Scriven in reduction of the debt. And it does not appear in any part of the case that the parties, after the first purchase by Scriven, made or recognized any definite bargain, except that Scriven was desirous of having a written contract, and Moote was not disposed to make one. There can be no doubt from the whole case that Moote was to have the property back at some time and on some terms, and the answer admits a bargain to sell on one year's time. As no further incumbrances were bought up to protect this tract, and the statement in the answer does away with any difficulty under the statute of frauds, we think that time was not so far of the essence of the contract as to prevent its present enforcement upon equitable terms. The court below, in its decree, allowed Scriven only seven per cent. simple interest, and allowed nothing for his expenses. This was not equitable. We think the twelve and a half per cent. was not too large an allowance for the interest and original expenses and trouble about the business, as the extra two and a half per cent. did not much exceed thirty dollars, and that ten per cent. interest should be allowed annually thereafter. On these

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terms we think he should be allowed to obtain back the premises. The whole case is so involved in contradictions that it is not easy to tell just what was agreed upon, and probably there was no very definite understanding. But there is no doubt at all that Scriven never would have advanced his money on less favorable terms, and without that advance Moote would have lost his land entirely. An agreement to sell is more in accordance with all the facts than a mortgage, and it would be grossly inequitable to allow a redemption on any conditions less favorable to Scriven, who has not been dealt with very fairly, and has received no advantage fram the transaction, which was not of his own seeking.

The other property is very differently situated. In April, 1871, Scriven held a claim against Moote secured by a chattel mortgage on growing wheat upon both these tracts. Moote had made this mortgage in February, 1871, on the assurance that he had a good title to the land. As a matter of fact his title to the one hundred and sixty acres on section eighteen had been sold on execution and the redemption had expired, so that Moote had no further interest in the land. The execution title was held by one Gibbs, who also had a subsequent mortgage on the premises. The time for redemption by judgment creditors had not yet passed, and Moote confessed judgment in favor of Scriven, who then redeemed from Gibbs, but was in turn cut off by a subsequent redemption by one Babcock in the interest of Gibbs. An arrangement was then made between Moote and Scriven, whereby the latter was to purchase the title and give Gibbs a mortgage for the amount due him, Moote giving his note for the debt. It was agreed that upon Moote's repayment of the advances and interest, Scriven should convey his title. Upon the question of time there is a direct conflict. Scriven says the payments were to be made in two years. Moote claims the advance was to be repaid without limit of time. From time to time thereafter Scriven had to advance further sums to pay off the Gibbs mortgage and other incumbrances

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and claims, until his advances had reached a large sum, and Moote, though holding the land and getting the proceeds, had done nothing to reduce the debt, and had not paid interest.

Under these circumstances, in April, 1874, the lot on section eighteen was sold on some earlier mortgages on chancery sales, and bid off by Scriven. Moote claims that this purchase was also made under an arrangement for his benefit, and that the whole interest of Scriven is that of a mortgagee.

Upon what took place before the chancery sales there is a downright contradiction between the parties, which is not much cleared up by the other witnesses. Moote makes it out a continuance, though by special arrangement, of the old arrangement whereby Scriven was to advance money and hold security on the lands. Scriven denies it entirely.

The original arrangement bears no resemblance to a mortgage. Moote had no interest in the land whatever. The dealings amounted only to a verbal agreement with Scriven to advance money to purchase lands and to remove incumbrances on them, which he was ultimately to transfer to Moote on repayment. There was nothing which could have been enforced by specific performance, as Moote was all the time in possession, and there was no act of his to his own prejudice which would amount to a part performance. He had never been able to perform, and by reason of his neglect Scriven had been compelled to make advances beyond any agreement for his own protection. The whole circumstances render it very improbable that he would go on any further in this way. He was obliged to buy in the property at the chancery sales to save what he had already paid out, and even if he had been a mortgagee, it is not easy to see why he could not buy up such a title if he chose and hold it like any other purchaser, inasmuch as it was a legal sale of the mortgagor's equity, which any one could buy unless estopped.

Without discussing the conflicting proofs, there is not

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only no evidence of a bargain conforming to the statute of frauds, whereby Moote was to have any interest, but there is not, as we think, convincing proof of any bargain at all. We think that whatever may have been the state of things before, the chancery sale cut off all previous equities, but we do not think that the previous transactions indicate any very strong equities. The dealings throughout show Moote to have been slack and entirely disregardful of his obligations; and Scriven does not appear to have acted unfairly or oppressively in any instance. It is not surprising that his patience had become exhausted. He was under no obligation to consider his own rights subordinate to the convenience of Moote.

The decree below, refusing redress to Moote concerning any supposed rights in section eighteen, must be affirmed, and the decree as to the forty-acre lot on section seven modified so as to require Moote to pay interest at the rate of ten per cent. from May 6th, 1871, on the amount of one thousand two hundred and ninety-eight dollars and eighty-four cents, and also two and a half per cent., or thirty-two dollars and forty-six cents, with interest at the same rate of ten per cent., Scriven to recover costs of both courts.

The other Justices concurred.

Walter Goodenow v. Thomas Curtis.

Mortgages: Condition: Construction. A mortgage made conditional on removal of certain specified defects of title is held enforceable on performance of the condition, and not defeasible by a showing of other defects not specified in the condition.

Equity jurisprudence: He who seeks equity must do equity. A debtor cannot be relieved in equity of a debt he honestly owes, by reason of his creditor having made such an alteration in a security as may prevent his enforcing it according to its terms. He who seeks equity must be prepared to do equity.

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GOODENOW *v.* CURTIS.

Promissory notes: Conditional promise: Non-negotiable paper: Alteration. The alteration by interpolating the words "or bearer" in an instrument in form of a promissory note, but made expressly subject to the conditions of a mortgage not payable absolutely, but only on certain contingencies, in no way invalidates or changes the legal effect of the instrument; such an instrument is not negotiable, and the use of the words in question would not make it so.

Bill to cancel a mortgage: Mortgage held valid: Decree: Redemption. The proper decree where a mortgagor files a bill to cancel a mortgage past due, and which his adversary is seeking to foreclose, and the court finds the mortgage to be valid, is a decree for redemption. Every such bill is regarded as in the alternative a bill to redeem, upon the principle that a complainant seeking equity must be prepared to do equity.

Bill to redeem: Dismissal: Absolute foreclosure. The effect of simply dismissing a bill to redeem is an immediate and absolute foreclosure.

Costs: Damages for vexation. The decree below having erroneously denied the defendant his full costs, but he having failed to appeal, on affirmance upon complainant's appeal, which is held to be utterly without merit, the payment of such costs is imposed as damages for the vexation.

Heard April 6. Decided April 11.

Appeal in Chancery from Calhoun Circuit.

T. G. Pray and *Rienzi Loud*, for complainant.

Thomas Curtis, in person, for defendant.

CAMPBELL, J:

This is the third litigation in this court arising out of the sale of certain hotel premises in Albion. The present controversy arises out of an attempt to foreclose a purchase money mortgage, which Goodenow claims should be restrained; *first*, because a condition precedent remains unperformed, and *second*, because of an alleged alteration in the note secured by the mortgage. The decision in the court below was in favor of Curtis on the main issue, and is appealed from by Goodenow.

The condition referred to arose out of an apparent defect in the title. Two thousand dollars of the purchase money was to be detained until this was removed, and the note and mortgage were framed accordingly. The note was drawn September 9, 1865, payable, with annual interest, on or before the 9th day of September, 1867, "according to

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a certain indenture of mortgage bearing even date herewith, payable to the said Thomas Curtis," etc. The condition of the mortgage, so far as it bears on the defect of title, was as follows:

"The said two thousand dollars being for purchase money for the same, detained by the party of the first part as security for the perfection of the title, to be made good by the party of the second part, to-wit: a deed from Rice (and wife if any), or in chancery, or his legal representatives, to the party of the first part; also a mortgage to be discharged from record, made by one Joseph French, July third (3), 1841, unless the same shall outlaw prior to the time of payment of this indenture; all to be arranged and completed on or before two years from this date, at which time this mortgage shall become due and be paid; but in case the title shall be made good as aforesaid, prior to the ninth day of September, 1867, the party of the second part shall give ninety days' notice to the parties of the first part of the arrangement of said title as aforesaid, the full time to not exceed two years from the date of this instrument," etc. "*Provided always*, and these presents are upon this express condition, that if the said party of the first part pay or cause to be paid to the said party of the second part, his heirs or assigns, the sum of two thousand dollars, after due notice has been given, or on the ninth day of September, 1867, after the perfection of said title as within specified, with interest annually, according to the condition of a certain note or writing obligatory, bearing even date herewith, executed by the said Walter Goodenow to the said party of the second part, as a collateral security, then these presents and the said note or writing obligatory shall cease and be null and void," etc.

It appears from this document that both parties had fully agreed what defects of title they would stipulate to have removed. One was the French mortgage, which was to be discharged unless outlawed. The other was the necessity of a deed from one Rice or his heirs. It was not an

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agreement or condition to make a perfect title, nor an assertion of the validity or invalidity of any claim of Rice, or under the French mortgage. The condition was definite and specific, that the money should be due when the French mortgage was discharged or outlawed, and when a deed was obtained from Rice or his estate.

It was decided in *Curtis v. Goodenow, 24 Mich. R., 18*, that the French mortgage had become outlawed. That left only the Rice deed to be obtained. A general disclaimer had then been procured from Rice, but it was held insufficient, because a disclaimer, addressed to no one, and containing no release or conveyance, was nugatory. The parties had seen fit for some reason to require a deed from him to Goodenow, and a disclaimer was not such a deed.

The present record shows that conveyances have been obtained from all of Rice's heirs to Goodenow. This is a complete performance of the condition, and no further act is necessary to complete the obligation to pay the sum detained, with interest. If there are any other defects, they formed no element in this condition, and cannot operate to interfere with it; nor can they change the duty to pay the money.

The other point relied on to defeat the mortgage is an alleged alteration in the note, by interpolating the words "or bearer," which it is claimed were not in the note originally.

The note (if it can be properly called a note) reads as follows:

"For value received, I promise to pay Thomas Curtis, or bearer, the sum of two thousand dollars with use, according to a certain indenture of mortgage bearing even date herewith, payable to the said Thomas Curtis, on village lots No. one, two, three, and four, on block thirty-three, in the village of Albion, Mich., to be paid on or before the 9th day of September, 1867, with annual interest. Dated Albion, Mich., Sept. 9, 1865.

"[Signed] WALTER GOODENOW."

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It is certainly a new idea that a debtor can come into a court of equity and ask affirmative relief to get rid of a debt which he honestly owes, because his creditor has made such an alteration in a security as may prevent his enforcing it according to its terms. It is a cardinal principle that equity will not aid a party in doing that which is not equitable. He who seeks equity must be prepared to do equity. Such a bill as the one before us is unprecedented and anomalous, so far as it seeks to avoid the mortgage for the alleged alteration. If that had been the only allegation, the bill would have been demurrable for want of equity.

But the alteration, if made by Mr. Curtis (upon which, if it were necessary to decide it, we should desire to be very clearly satisfied), in no way changed the legal effect of the instrument. It was made expressly subject to the conditions of the mortgage. The money was not payable absolutely, but only on certain contingencies, and the time of payment was also subject to be fixed or changed by the performance of certain acts by the payee. Such an instrument cannot be made negotiable by the use of the word bearer or order, or by any language, and the insertion of such language would be entirely nugatory. The note is the same without the words "or bearer," as with them, and if they were inserted without Goodenow's consent, the change was in law no change, and the note was not thereby invalidated, either at law or in equity. Curtis has performed all the conditions which he was bound to perform, and the mortgage is wholly due and unpaid, and subject to foreclosure.

The question of alteration was fully presented by the record in the case of *Curtis v. Goodenow, 24 Mich., 18*, before referred to, where it was not considered important enough to be discussed. The bill there was dismissed without prejudice, and only dismissed at all on the ground of the deficiency in the supposed removal of the defect of title. It was not then imagined that the alteration controversy could again appear in court, and still less that it would be deemed material enough to interfere with any of the rights

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of Curtis. We do not understand on what principle the personal liability of Goodenow was deemed by the circuit court to have been discharged. The defendant has not appealed, and the question is probably not of any moment, inasmuch as the land is evidently full security for the debt, and hereafter it will not be competent to dispute the mortgage or its complete validity, which is now finally determined on the facts.

The proper decree in this case, as in all cases where a mortgagor attempts to get rid of a mortgage which is due and valid, and which his adversary seeks to foreclose, is a decree for redemption. This was practically decided in *Schwarz v. Sears, Walker's Chancery R., 19*, and has been the constant practice. Every such bill is regarded as in the alternative a bill to redeem, upon the principle that a complainant seeking equity must be prepared to do equity, and this requires payment of his mortgage debt without further proceedings. In *Schwarz v. Sears* it was intimated that the decree should be one of redemption or strict foreclosure, and that if a defendant desired a sale and its consequent rights as to deficiency, he should file a cross-bill. That practice has been disapproved, and our practice is now settled in favor of a sale in case of non-redemption.—*Fosdick v. Van Husan, 21 Mich. R., 567.* The effect of simply dismissing a bill to redeem, is an immediate and absolute foreclosure. The bill before us contains no alternative prayer for redemption, and the decree below evidently ignored the true nature of such a bill, and did not either order a redemption or impose the usual conditions. The defendant not appealing, it is questionable whether we can properly disturb it in his favor, but the change ought to be made, and will be made if desired by the complainant. We do not think it proper to discuss the possible effect of the present decree as it stands. It finally and irrevocably settles defendant's mortgage rights. Beyond that we need not examine it.

It was improper to deny the defendant his full costs in

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the court below. This defect can be rectified, as we regard this appeal as utterly without merits, and can impose the terms of paying such costs as damages for the vexation. The decree will be affirmed, with the entire costs of both courts, including those which were denied to the defendant by the decree. If the complainant desires to end this litigation which has already fixed his liability, it may be done by making the usual decree for payment in ninety days, or sale on default of redemption.

The other Justices concurred.

Philip C. Livingston v. George H. Burroughs.

False imprisonment: Evidence: Malice: Motives. In an action for false imprisonment, where the plaintiff has introduced evidence to show that defendant caused the arrest complained of at the instance of a third person to get plaintiff out of the way so that he could not testify as a witness in a suit then pending, defendant may give evidence as to conversations with such third person as to the arrest, tending to show that he was not induced to make the arrest for any such purpose.

Exemplary damages: Evidence. Where exemplary damages are claimed and are admissible it becomes a material question whether the defendant acted prudently, wisely, or in good faith, and for this purpose the information on which he acted, whether true or false, is original and material evidence.

False imprisonment: Criminal complaints: Sources of information. The information which, if believed, will justify making a criminal complaint, must be of such character and obtained from such sources that business men generally, of ordinary care, prudence and discretion, would act upon it under similar circumstances; and whether the facts of a case bring it within this rule, is a question for the jury.

False imprisonment: Advice of counsel: Attorney. The advice of one not an attorney, but who sometimes advises his neighbors for pay, is not admissible in evidence as advice of counsel in an action for false imprisonment.

False imprisonment: Evidence: Probable cause: Exemplary damages: Actual damages. In an action for false imprisonment, in procuring plaintiff's arrest upon a criminal complaint and warrant which charged no offense known to the law, the question whether the defendant has reasonable or probable cause for making the complaint is wholly immaterial, except as it affects the recovery of exemplary damages; his good

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faith could not prevent the recovery of the actual damages plaintiff suffered.

Submitted on briefs January 19. Decided April 18.

Error to Wayne Circuit.

George H. Prentis, for plaintiff in error.

Moore & Moore, for defendant in error.

MARSTON, J:

This was an action on the case for false imprisonment. Defendant in error made complaint before Caleb J. Barlow, a justice of the peace, upon which a warrant was issued, and plaintiff in error arrested thereon, at the city of Detroit, December 13, 1873. The plaintiff testified on his own behalf that he was taken before the justice on the evening of the same day that he was arrested, and that he "stayed with the said justice from that time (Saturday, December 13th, 1873) until Monday morning, December 15th, when the said defendant Burroughs appeared, and on his motion the examination was adjourned until December 30th, although the plaintiff was ready and asked that the examination should be had at that time, and said plaintiff was allowed to go upon his own recognizance from said 15th to said 30th day of December;" that on the 30th the parties again appeared and such proceedings were thereupon had that the plaintiff was discharged.

It seems to have been conceded on the trial in the court below, and also in this court, that neither the complaint made before the justice, nor the warrant issued thereon, alleged any offense known to the law, and that the arrest and imprisonment thereunder were consequently illegal.

The defendant was examined as a witness on his own behalf; and after testifying that he made the complaint and caused the warrant to be issued, he further testified that he did so "under the advice of one William E. Warner, who was not an attorney, but who sometimes gave advice to his

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neighbors in the country for pay; and also upon the statements of Myron Ellis and one or two others, that the said plaintiff Livingston intended to cheat him, Burroughs, out of what he, Livingston, owed him." He also testified to statements made to him by the plaintiff, and also by several other parties, as to conveyances of certain lands for the purpose of cheating him. This evidence was all objected to, but upon what ground does not appear. After all the evidence in the case was introduced, and before the case was submitted to the jury, counsel for the plaintiff moved to strike out all this evidence on the ground that it was incompetent, irrelevant and immaterial. The motion was overruled, counsel excepted, and error is assigned thereon.

Counsel for defendant in error now insist that this evidence was introduced in mitigation of damages, for the purpose of showing that defendant had reasonable or probable cause for making the complaint, and that he was not actuated by malice.

Evidence had been introduced on the part of the plaintiff tending to show that Burroughs was induced to cause plaintiff's arrest at the instance of one Ellis, who wanted to get plaintiff out of the way, so that he could not be a witness in a certain cause then pending at the time of his arrest. Defendant had undoubtedly the right to prove by any competent testimony that he was not induced to make the arrest for any such purpose as the one to which the plaintiff had thus testified, and for this purpose might have introduced and testified to the conversations he had with Ellis, if any, in reference to the arrest. But independent of this, we still think the evidence was admissible in case the plaintiff claimed any thing more than actual damages in the case. Exemplary damages may be allowed in cases where the elements of fraud, malice, gross negligence or oppression mingle in the controversy. In such cases it becomes a material question whether the defendant acted prudently, wisely or in good faith, and for this purpose the

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information on which he acted, whether true or false, is original and material evidence.—*1 Green. Ev. § 101.*

For the purpose of determining whether, under all the circumstances, the party acted in good faith or not, the jury will have the right, and it will be their duty, to consider the sources from which the party sought and derived his information. He would not be justified in knowingly seeking and acting upon information, either of law or fact, given him by unreliable or disreputable parties. We can but say that the information should be of such character, and be obtained from such sources, that business men generally, of ordinary care, prudence and discretion, would act upon it under similar circumstances, believing it to be reliable.—*Gallaway v. Burr, 32 Mich., 332.* And whether the facts will bring the case within this rule or not, must be a question for the jury.

The evidence as to the advice of Warner was inadmissible. This is disposed of in *Stanton v. Hart, 27 Mich., 540.*

The court, at the request of defendant's counsel, charged the jury, *first*, "that the evidence in this case shows a case of malicious prosecution, if it shows any thing, and that under the plaintiff's declaration he cannot maintain a case of malicious prosecution."

The court was also requested to charge, *fourth*, "that the jury cannot find in favor of the plaintiff Livingston, without being satisfied that Burroughs procured the arrest of Livingston without reasonable or probable cause for making the complaint before justice Barlow, and that Burroughs, in making the complaint, was actuated by feelings of malice." To which the court said: "I will say to you on that, that you can find nothing more than nominal damages."

We think the first request as given was ambiguous and likely to mislead the jury. As to the fourth, whether Burroughs had or had not reasonable or probable cause for making the complaint, was wholly immaterial, except as it might affect the question of exemplary damages. His good faith could not prevent the plaintiff from recovering the

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actual damages he had suffered from the alleged false imprisonment.

The judgment must be reversed, and a new trial ordered.

The other Justices concurred.

Charles H. Barry v. Stephen B. Davis.

Executors: Submitting a demand against the estate to litigation jointly with a demand against another. An executor or administrator cannot bind the estate by an arrangement with one having a demand against it and also one against a third party, to submit the question of liability and the amount thereof on both demands directly to the circuit court in a single suit.

Estates of deceased persons: Claim for services: Evidence. Where a claimant seeking to recover from an estate for services rendered the deceased in his lifetime has been cross-examined as to whether he had any arrangement as to price with the deceased, with inquiries so framed as to draw out the particulars of the contract of hiring, the party making such inquiries may not afterwards have the evidence stricken out as not responsive in that particular.

Contracts: Reference to other instruments: Distinct agreements: Construction. The fact that an agreement between parties mentions another agreement between one of them and a third person, and uses the same language in part, quoting so much as was pertinent, does not necessitate their being read together if not so intended, and where each stands on its own basis and is capable of being construed and enforced independently.

Evidence: Employes: Silence: Admission: Failure to deny. The silence of an employe when his employer stated to a fellow employe in his presence that the former was to have a dollar a day and the latter should have the same, ought not to be treated as an admission of the truth of such statement, in his suit for wages, at least not in the absence of any showing that he in fact heard it, or that it was made in such a way as to call upon him to deny it if untrue; and the rejection of evidence of such statement is not error.

Evidence: Conversations. The exclusion of parts of conversations between the parties, which are connected in sense with other parts thereof which were admitted and are pertinent to the subject matter in controversy, is held error.

Heard April 4 and 5. Decided April 18.

Error to St. Joseph Circuit.

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BARRY v. DAVIS.

John B. Shipman and *Upson & Thompson*, for plaintiff in error.

H. H. Riley, for defendant in error.

GRAVES, J:

For some time before his death, John S. Barry was associated in trade with John K. Briggs, and Davis was in their service when Mr. Barry died. He continued with Mr. Briggs, the survivor, and was also for a time in the service of Briggs whilst the latter was acting as receiver.

Charles H. Barry is executor of John S. Barry, and a large beneficiary. Davis having a claim for his services in these different positions, and there being some dispute as to the amount of it, it was deemed desirable to adopt some course by which the amount might be lawfully fixed and the payment rendered certain without multiplying proceedings and inflaming the expense. This was deemed practicable through a single suit brought directly in the circuit court by Davis against Charles H. Barry, subject to the controlling force of an agreement in writing. The suit was brought, and the writing framed and executed. The result was, that Davis recovered six hundred and seven dollars and forty-five cents. Barry now asks a reversal on the ground of errors to his prejudice on the trial.

The agreement in question is a personal assumption by Charles H. Barry of the entire liability, more or less, to Davis. The mention of his executorship cannot alter the inherent quality of the arrangement. The estate could not be brought into litigation in the circuit court and be rendered subject to the liabilities and incidents of the proceedings in this way. Whatever moral or legal chances Charles H. Barry may rely on for indemnity out of the estate, the law cannot look upon this suit as one between Davis and the estate of John S. Barry. The action must find its basis and privity in the obligation between Charles H. Barry

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and Davis, and the suit must be regarded as one between those persons.

Davis being on the stand, his counsel was proceeding to show by him that an arrangement existed between him and John S. Barry for the rate of compensation for the first year, and the judge stopped him and remarked that his opinion then was that the conversation could not be shown. His counsel then asked him what his services were worth, and the counsel for Barry objected, that it had appeared an arrangement was made and hence it was incumbent on Davis to prove what that arrangement was. This objection was followed up by Barry's counsel with this claim: "We ask now to cross-examine the witness upon what was said to him by John S. Barry in his lifetime, simply to inquire if there was an arrangement made and what it was." —"We propose to examine him as to whether there was or was not a special agreement between him and John S. Barry as to what was to be paid him that year." The court refused permission, and Davis' counsel then asked him to state what his services were worth for that year, to which he replied: "A dollar a day was what I hired for that year." After this ineffectual trial to interpose and cross-examine at once, as to whether Davis and John S. Barry made an arrangement, and if so, as to what it was, the counsel for plaintiff in error, as soon as the witness came under cross-examination, proceeded to make inquiries so framed as to call out the nature of that arrangement. In view of the explanation when the attempt was made to interpose, the mode of inquiry chosen, when the cross-examination was had, was naturally adopted to elicit a statement of the nature of the arrangement between Davis and John S. Barry. Still after getting the answers the counsel was dissatisfied, and sought some time after to have them stricken out as not responsive. The rulings offered no cause for complaint by plaintiff in error, and the reasons are so obvious that we ought not to consume time in stating them.

Several errors are predicated on the rejection of an agree-

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ment made August 2d, 1871, between plaintiff in error and Briggs, and mentioned in the stipulation already alluded to between the parties to this cause. We fail to see how that paper could have aided either side if it had been admitted. It was made between other parties and its provisions could afford no legal explanations in this cause, and all of the matter contained in it having any pertinency whatever to what is disputed in this action is quoted in the agreement made by these parties, and the circumstance that they chose to use some of the language, when they came to make their separate agreement, is not enough. Their contract stands on its own basis and by itself, and must be construed and enforced independently. There is no ground for saying they intended the two instruments should be read together, and we see no reason why they should have intended it.

The witness Carl was allowed to answer a question which plaintiff in error had objected to on specific grounds. Error is assigned upon the ruling, but the position taken below is abandoned, and the objection now urged relates only to the discretionary province of the court in regard to the order and mode of examination. The point in any view is untenable.

The deposition of plaintiff in error was offered in evidence, and on objection the court excluded the answers to the seventh, ninth and eleventh, and distinct parts of the tenth interrogatories. The ruling in regard to the ninth was unquestionably correct. There deponent only assumed to relate what Briggs had said in regard to the wages he was paying.

There is more question about the seventh and eleventh. In those, deponent states that Briggs told Carl in the presence of defendant in error that the latter was to have one dollar per day, and that he, Carl, was to have the same.

It does not appear that defendant in error made any reply, or that he heard the observation or was in a situation to hear it; and if it were true that he heard it, there would still be the question, whether it required him to take

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notice of it and deny the statement if untrue, at the peril, if he did not, of having his silence thereafter proved against him as an admission. The remark does not appear to have been directed to him, or to have been made with any view to call upon him to speak out in any way. Under the circumstances, I am inclined to think the plaintiff in error not entitled to a reversal on account of these rulings. Before being entitled to ask the jury to infer any thing against defendant in error in the nature of an assent to, or acquiescence in the statement imputed to Briggs in his presence, the plaintiff in error should, at the least, have shown *prima facie* that defendant in error was in a situation to hear, and did not appear to dissent.

The answer to the tenth interrogatory purports to relate conversations between the parties themselves in regard to the rate of pay which defendant in error had agreed to accept; the plaintiff in error claiming that the price had been fixed by agreement at one dollar per day, and defendant in error contending that he ought to get more, because he could not live on such wages. The court excluded, on objection, a portion of each conversation, and the part excluded was not only connected with the rest in sense, and proper to be read with it by the jury to enable them to set a fair and true estimate upon it, but what was so excluded related somewhat specifically to the vital question between the parties. I can find no substantial support for this ruling. Whether, in case the evidence had been let in, the jurors' judgments would have been changed in any way in regard to the merits, cannot be known. But I discover no legal objection to it, and seeing in the nature of it something that the jury would have lawful right to consider as entitled to some weight in the scale, there seems to be no room for saying the rejection of it was not prejudicial error. For this I think the judgment must be reversed. There are no other points which require notice at this time.

Judgment reversed, with costs, and a new trial ordered.

The other Justices concurred.

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The First National Bank of Sturgis v. Eli G. Bennett and others.

Banks: President: Agency: Authority. It is doubtful whether a genera authority in the president of a bank to make discounts could empower him to make an arrangement under which the bank would surrender securities on receiving others which it was at the same time agreed should be mere nullities so far as the sureties were concerned.

Guaranty: Bank president: Agency: Individual contract. A guaranty against loss or liability for signing as sureties, given by a bank president in his own name and without authority from the directors, to those whom he had solicited thus to sign a note given to the bank to retire a prior note held by it against their principal, is held to be the individual contract of the president, and not binding upon the bank.

Guaranty: Banks: Sureties: General banking law. Such a guaranty, if made by the bank and binding upon it, would be a bar to any suit by the bank against the sureties; and it is doubtful whether under the general banking law a national bank could give such a guaranty in a case where the effect would be to make the paper discounted the paper of one party only, secured by mortgage on real estate.

Guaranty: Statute of frauds: Written instrument: Parol evidence. A guaranty to sureties against loss or liability is within the statute of frauds as an undertaking to answer for the debt or default of another; and when made in writing in the name of one party and purporting on its face to bind no other, can no more be shown by parol to be in fact the undertaking of a different party, than could such a liability be originally created by parol.

Heard April 6. Decided April 18.

Case made from Branch Circuit.

Upson & Thompson, for plaintiff, as to the lack of authority in the bank under the statute to make the contract asserted by defendants, cited: *Kansas Valley National Bank v. Milo, 2 Dill., 371; Bank v. Lanier, 11 Wall., 369; Fowler v. Scully, 72 Penn. St., 456;* and that the lawful powers of the bank and the authority of its officers were matters of law of which all persons dealing with the bank were bound to take notice, and of which they could not plead ignorance: *Ang. & A. on Corp.,* § *299; 1 Doug., 457; Wyman v. Hallowel, etc., Bank, 14 Mass., 61; Salem Bank v. Gloucester Bank, 27 Mass., 29.*

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FIRST NATIONAL BANK OF STURGIS v. BENNETT.

An agreement by the president and cashier of a bank, that an indorser shall not be liable on his indorsement, is not binding on the bank. It is not within the scope of their duties, and they cannot bind their principal except in the discharge of their ordinary duties: *Ang. & A. on Corp., §§ 298, 301, 309; Story on Agency, § 115; Morse on Banking, 134; Parsons' Merc. Law, 140, note 1; Bank v. Dunn, 6 Pet., 51; Bank v. Jones, 8 Pet., 16; Miner v. Bank, 1 Pet., 70; Hodge v. Bank, 22 Gratt., 51; Harrisburg Bank v. Tyler, 3 W. & S., 376; Merchants' Bank v. Marine Bank, 3 Gill., 96; Crump v. U. S. Mining Co., 7 Gratt., 352; Booth v. Bank, 4 Lans., 301.*

Oral evidence not admissible to vary a written contract by showing that what purports to be the individual guaranty of the president of the bank was in fact the contract of the bank: *Hiatt v. Simpson, 8 Ind., 256.*

John B. Shipman and *H. H. Riley*, for defendants, argued that it was immaterial whether the guaranty in question was in the name of the bank or in the president's official or individual name; the parties dealing with the officer, supposing it is the bank they are dealing with, and the bank receiving the benefit of the transaction, it becomes the act of the bank; and these facts may be shown by parol: *Tremont Bank v. Paine, 28 Vt., 24; Sterling v. Marietta, etc., 11 S. & R., 179; Terrell v. Branch Bank, 12 Ala., 502; Coleman v. First Natl. Bank, 53 N. Y., 388; Van Lauran v. Bank, 6 Lans., 373; Morse on Banking, 130-1;* and the bank by their silence ratified the transaction afterwards; see *Morse on Banking, 107; United Society, etc., v. Underwood, 9 Bush, 609; 15 Am., 731; Pahquiogne Bank v. Bethel Bank, 36 Conn., 325; 4 Am., 80.*

The guaranty and note being executed at the same time, and relating to the same subject matter, constitute

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but one transaction, and are to be read as one contract: *Benson v. Green, Walk. Ch., 56; Norris v. Hill, 1 Mich., 202; Dudgeon v. Haggart, 17 Mich., 275; Johnson v. Moore, 28 Mich., 3.*

If the guaranty be *ultra vires*, then, being a material part of the consideration to the sureties for their signatures, if it be illegal or void, the whole contract falls: *1 Pars. Cont. (5th ed.), 455-9; De Banski v. Page, 36 N. Y., 537.*

The bank having seen fit to appropriate part of this transaction and to sue upon it, with full knowledge of all the circumstances, thereby ratified the whole: *Curtis v. Leavitt, 15 N. Y., 9; 6 Paige, 497; Robinson v. Bealle, 20 Ga., 275; Morse on Banking, 106-8.*

One claiming the benefit of a contract made by an agent, any part of which is in excess of his authority, takes it *cum onere*, and is estopped from questioning the authority of the agent in any part of the transaction: *1 Pars. Cont., 44-7, 117; Big. on Estoppel, 584; Story on Agency, 239-60; Hovey v. Peck, 7 East, 164; Coleman v. Stark, 1 Ore., 115; Williamson v. Canady, 3 Ired., 349; Bennett v. Judson, 21 N. Y., 238; Elwell v. Chamberlain, 31 N. Y., 611; Craus v. Hunter, 28 N. Y., 389; Barber v. Brittan, 26 Vt., 112; Mundorf v. Wickersham, 63 Penn. St., 87; 3 Am., 531.*

COOLEY, CH. J:

This action is brought upon a promissory note for five thousand dollars, given to the plaintiff by the defendant Bennett as principal, and the defendants Buck and Newhall as sureties, bearing date November 16th, 1867, and payable in ninety days from that date. The amount of the note was applied, in the main, to the taking up of a previous note held by the plaintiff against Bennett, on which other parties were sureties.

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The defense is based upon transactions which occurred contemporaneous with the giving of the note sued upon. It appears that Richard Reed was at that time president of the bank, and was very desirous of accommodating Bennett with a discount, for reasons which are not explained: he therefore undertook to procure sureties for Bennett, and personally solicited Buck and Newhall to become such sureties. They at first declined, but Reed took from Bennett a note of five thousand dollars to himself, with a mortgage on real estate collateral thereto, the sum being nominally payable in six months, and considering this a sufficient indemnity, executed and delivered to Buck the following paper:

"Sturgis, November 18th, 1867. For value received, I hereby guaranty Benjamin C. Buck against all loss or liability by reason of signing a note with E. G. Bennett for five thousand dollars, discounted at the First National Bank of Sturgis, dated November 16th, 1867, and due ninety days from date. Richard Reed."

He also executed and delivered a paper of corresponding import to Newhall.

The mortgage which Reed took was subsequently foreclosed in his name, but nothing has as yet been realized upon it. Buck and Newhall defend this suit on the claim that the guaranty given to them respectively, is really the guaranty of the bank, and therefore constitutes a legal bar to any claim against them on the note.

The defense is sought to be made out on the testimony of Reed. It is not claimed that the directors of the bank ever authorized him to give any guaranty on behalf of the bank, or that they were privy to or cognizant of Reed's negotiations on behalf of Bennett. The defense rely upon the fact, which was very clearly established, that Reed at the time had general charge of all discounts by the bank, and in respect to them was allowed to exercise all the powers of the board of directors.

It is a serious question whether a general authority in the president of a bank to make discounts, could empower

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him to make an arrangement under which the bank would surrender securities on receiving others, which it was at the same time agreed should be mere nullities so far as the sureties were concerned. But this would be the effect of the arrangement now under consideration, if the guaranty made by Reed can be treated as the guaranty of the bank. The circuit judge was quite right in holding that such a guaranty, if made by the bank and binding upon it, would be a bar to any suit by the bank against the sureties. It would also be a serious question whether, under the general banking law, the bank itself could give such a guaranty, when the effect would be to make the paper discounted the paper of one party only, secured by mortgages on real estate.

But we think these questions not involved in the present case. The guaranties given by Reed to Buck and Newhall were on their face his own guaranties, and did not purport to bind the bank in any manner. They were also undertakings to answer for the debt or default of another, and were therefore directly within the statute of frauds, and would have been invalid if not in writing.

They could only be made the undertakings of the bank by the parol evidence of Reed as to his understanding and purpose to bind the bank by giving them. But when that understanding and purpose are proved, the whole arrangement, so far as the bank is concerned, is left to rest in parol, and the bank, if charged at all, is made liable on a contract that on its face is plainly and professedly the contract of Reed alone. This is not only directly in the face of the statute of frauds, but it is difficult to conceive of a case in which the reasons for the enactment of the statute could apply with more force. The arrangement, as it appears on its face, was valid in all its parts; the bank could enforce the note against all the parties to it, and the sureties could enforce the guaranty against Reed, who had solicited their signature to the note. But the arrangement, as Reed sets it up, defeats itself in the most important particular, by making the guaranty nullify the obligation of the

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sureties. Now if Reed can shoulder his responsibilities upon the bank by the parol evidence which is to make the bank promise in his name, the statute is not only set aside, so far as it precludes one being charged by parol for the debt or default of another, but the written engagement of Reed, which is perfectly legal and valid on its face, and which, as a personal undertaking, is entirely consistent with the circumstances, is at the same time remodeled by releasing the ostensible party and charging another who by the writing does not appear to have any connection with it.

It is very manifest, we think, that the court erred in admitting the parol evidence to charge the bank on Reed's guaranties. The judgment must consequently be reversed.

As this is a case made, and the facts are all found which show the liability of the defendants, judgment will be entered against them on the finding for the amount of the note, with costs of both courts.

The other Justices concurred.

Charles F. Campau v. Harry Button and others.

Certiorari: Parties. Certiorari to review proceedings to remove an encroachment upon an asserted highway, will not be dismissed on the ground that the plaintiff in the writ does not appear by the record technically and formally as an original party, when it is apparent he has rights which were affected by the proceedings, and that he was treated and recognized throughout as a substantial party.

Highways: Encroachments: Existence of highways. In proceedings under the statute to remove encroachments and obstructions to highways, it is not competent to make trial of the question of the existence of the asserted highway; if its existence is seriously questioned, that must be settled in some other way.

Heard April 6. Decided April 18.

Certiorari to Justice of the Peace, Highway Commissioner, and Clerk of the Township of Springwells.

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CAMPAU v. BUTTON.

A. G. Comstock and *F. A. Baker*, for plaintiff in *certiorari*.

Henry M. Cheever, for defendants in *certiorari*.

GRAVES, J:

The highway commissioner of Springwells proceeded under the statute, *chapter 27, C. L.* as amended by act sixty-five of the laws of 1875, to establish the existence of an encroachment on an asserted highway or street called Vinewood avenue, and the proceeding was prosecuted to a jury finding that the alleged encroachment existed.

A review is now asked by Charles F. Campau on *certiorari*.

The respondents object that he does not appear by the record to be in a situation to claim such review.

We cannot accede to this idea. The record plainly indicates that Campau has rights subject to be injuriously affected by the course taken, and, moreover, that the commissioner and the jurors, in fact, however informally and irregularly, treated and recognized him as a substantial party. It would be strange if third parties might shape a litigation so as to implicate his rights, and still exclude him as a party, and then after obtaining a determination prejudicial to his claim, deny him all right of review because he was not technically and formally an original party.

There are several errors in the proceedings, but there is no occasion to notice more than one or two.

First. The record shows that there was no evidence that the supposed encroachment was within a platted street or laid out highway.

Second. It is plain that the main and only substantial question attempted to be settled was whether the place occupied by the alleged encroachment was a public highway or private ground. The existence in fact of the erection supposed to be an encroachment, and the quality and extent of it, and its actual site, do not appear to have been seriously ques-

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tioned. The real dispute was, whether there was or was not a highway there.

As it did not appear that the erection touched any laid out and open highway, the proceeding was futile.—*Roberts v. Commr. of Highways of Cottrellville, 25 Mich., 23.* Moreover it was not competent to make actual trial before the jury whether or not a highway existed.

The legislature never meant to leave a matter of such importance and difficulty to be contested and decided summarily and by such a tribunal. The design was to allow a trial of the fact of encroachment when disputed, and not whether there was or was not a highway liable to be encroached upon. If seriously questioned, that must be settled in a different way. The statute *(§ 1290 C. L.)* first assumes there is a laid out and opened highway, and then passes on to provide an expeditious mode for deciding whether an alleged encroachment exists upon it. The jurisdiction only attaches in regard to something done against the highway, and not to any real controversy respecting the existence of the highway itself.—*Roberts v. Highway Comr., supra; Talmadge v. Hunting, 29 N. Y., 447; The Queen v. Farrer, L. R., 1 Q. B., 558.*

The proceeding must be quashed.

The other Justices concurred.

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ACCOUNT STATED.

1. Evidence tending to show that the parties met and settled up, and that a balance was struck and agreed upon, is admissible to prove an account stated, and is sufficient to authorize the submission of the question as one of fact to the jury. —*Albrecht v. Gies*, 389.

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2. The admission in evidence in an action upon an account stated, of an account between the parties tending to show dealings between them, is not error where the other evidence tends to show that such dealings had been examined and a balance agreed upon; moreover the account thus admitted in evidence in this case could not have prejudiced the defendant. —*Ibid.*
3. In an action upon an account stated only, the nature of the original transaction out of which the acknowledgment of indebtedness grew is immaterial.—*Ibid.*

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1. The fact that the plaintiff built her house upon wet and springy soil, and allowed water to accumulate and stand in her cellar, and thereby contributed to the disintegration of the mortar, whereby her walls were destroyed, cannot operate, through the aid or influence of the doctrine of contributory negligence, to shield the defendant from liability for any injury which his wrongful acts may have inflicted.—*Underwood v. Waldron, 232.*
2. All rules concerning the relative rights and duties of adjacent proprietors must have for their basis the concession to every one of the right to an undisturbed enjoyment of his own, so long as he does not make use of it to the injury or annoyance of others.—*Ibid.*
3. Where an injury results from the neglect of a duty which is common to both parties alike, neither can maintain an action against the other for such injury, which was the result as much of his own as of the other's negligence.—*Ibid.*
4. The respective duties which adjoining proprietors in a town, mutually improving their property, owe to one another, are those only which the requirements of good neighborhood in such a town would impose, *i. e.*, each must use all due care

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and prudence to protect his neighbor, but is not bound at all events and under all circumstances to protect him; and any injury that may result notwithstanding the observance of proper caution must be deemed incident to the ownership of town property, and can give no right of action.—*Ibid.*

5. Injuries from extraordinary or accidental circumstances for which no one is in fault, must be left to be borne by those on whom they fall.—*Ibid.*

6. Where two buildings are so situated that the water from the roof of one can only be prevented from flowing against and injuring the other by an eaves-trough attached to both, though the consent and co-operation of the owner of the building receiving the injury may be necessary, yet the duty of affirmative action is on the owner of the other building, and he may not lie by and see the water from his roof destroy his neighbor's wall, and rely for his protection upon the passiveness of his neighbor.—*Ibid.*

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1. Where sub-contractors have no authority to pledge the credit of their contractor for the board of their men, the mere fact of payment of a prior board bill upon the order of the sub-contractors, will not create any liability to pay subsequent bills; and in the absence of any showing of an original undertaking by such contractor, or of any act of ratification of any arrangement made by the sub-contractors, no recovery can be had against the former for such board bills incurred by the latter.—*Danaher v. Garlock*, *295*.
2. One employed in an adverse capacity cannot bind his principal by any thing he may do without authority prejudicial to his principal's interests.—*Powell v. Conant*, *396*.
3. It is doubtful whether a general authority in the president of a bank to make discounts could empower him to make an arrangement under which the bank would surrender securities on receiving others which it was at the same time agreed should be mere nullities so far as the sureties were concerned. —*First National Bank of Sturgis v. Bennett*, *520*.

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The statute of amendments (*Comp. L.*, § *6051*), saving judgments by default as against any "imperfect or insufficient return," cannot go beyond formal defects, or those by which "neither party shall have been prejudiced," and does not reach defects in jurisdictional showing.—*Denison v. Smith*, *155*.
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ARBITRATION.

1. It is not competent to open an award made by judges selected by the parties themselves for any small or slight occasion; yet fraud and mistake may furnish grounds for equitable interference.—*Beam v. Macomber, 127.*
2. In the case of an arbitration of partnership matters where each partner has kept account of his own matters, each is bound in good faith to lay before the arbitrators his whole knowledge of the facts, and any willful omission so to do is tantamount to fraud.—*Ibid.*
3. It requires some strong evidence to impeach a result on which the arbitrators heard the parties and exercised their judgment, and where there was no concealment of facts; something more than a mere showing by an accountant that the statement of account presented to the arbitrators by the opposite party was in a form not according with the rules of book-keeping, where it is apparent that the statement, as made out, could not mislead if compared with other papers in the case to which it must be presumed all the parties looked for information.—*Ibid.*

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Regularly one brought before a magistrate on a criminal charge should have read to him, and be required to plead to, the charge contained in the warrant, and not the original complaint.—*Sheldon v. Hill, 171.*

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1. In an action for an assault and battery an averment in one count of an attempt to ravish does not change the nature of the action, nor affect the quality or weight of evidence required to make out a case; and a ruling that should preclude a verdict upon such a charge unless the jury were convinced beyond a reasonable doubt would be error; such a rule of evidence is not applicable to civil controversies.—*Elliott v. Van Buren, 49.*

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2. The gist of the action being the assault and battery simply, and the matters of aggravation affecting only the amount of damages, any shortcomings in the proof of the felonious design would not preclude a verdict for such damage as was made out to the satisfaction of the jury.—*Ibid.*
3. The aggravation of an existing disease or injury by an assault is as reasonable a ground of complaint, and as proper an element to be considered in estimating damages, as the creation of a new one.—*Ibid.*

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Where the trial court has taken the cause away from the jury upon a ruling that the declaration, in describing the plaintiff in trover as assignee, etc., purports to be for a cause of action which had accrued to the assignors and had passed by the assignment to the plaintiff, the question of the validity of the assignment, as a transfer of title to the chattels, is not involved.—*Bloom v. Sexton, 181.*

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1. Assignments of error must be specific.—*Burt v. Olcott, 178.*
2. An assignment of error, not supported by any exception, will not prevail.—*Snyder v. Willey, 483.*
3. Allegations of error which the record as returned does not support, will not prevail.—*Ibid.*

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Where one who is mayor and councilman has, without collusion or fraud, been employed as an attorney to appear for the city and defend a suit brought against it, there is nothing in his official relations to the city to preclude his recovering the value of the services actually rendered under such employment.—*Mayor, etc., of Niles v. Muzzy, 61.*

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1. The practice of certifying up the stenographer's minutes

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1. The nature of the duties of a building superintendent are such that it would be improper that he should be appointed or controlled by the contractor; and the two positions being inconsistent, a contract will not be implied for the employment of the contractor as superintendent of his own work.—*Friedland v. McNeil*, *40*.

2. It will not be presumed there was error in admitting evidence of the value of the contractor's services as superintendent, in his action against his employers, where the record does not show that he may not have been employed as superintendent over the work of others upon the building, his contract being for the mason work only. All reasonable intendments are to be made in support of the rulings brought up for review.—*Ibid.*

3. Whether a provision in a building contract authorizing the employers, after notice to the contractor, to take the work into their own hands and complete it at the contractor's expense if he failed to proceed with due diligence, is not to be regarded when acted upon as a remedy agreed upon as a substitute for future damages:—*Quære?*—*Ibid.*

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4. Delay in the completion of a contract to do only the mason work of a church, will not authorize the recovery of the loss of pew rents as damages, at least not in the absence of special averments; such loss cannot be said to be the necessary, natural or probable result of the delay, since the completion of the contract does not put the building in condition for the renting of pews.—*Ibid.*
5. Where a contractor was to receive as part payment an eight per cent. mortgage running six years, an offer to show in defense to his action, that by reason of his failure to complete the contract in season the employers were compelled to borrow money at a higher rate to complete it themselves, is not sufficiently specific, in the absence of any proposal to show that the current rates for six year loans were higher than eight per cent., to warrant its reception as a basis for estimating damages.—*Ibid.*
6. It seems that the employers, by taking the work into their own hands under the proviso of the contract authorizing them so to do in case of unreasonable delay, thereby waived all claim to damages for being deprived of any benefits accruing to them from the stipulation regarding the mortgage.—*Ibid.*
7. Where the employers under a building contract have, by virtue of a proviso in their contract, taken the work into their own hands, and completed it at the expense of the contractor, they are entitled to show in defense to the contractor's action, what the completion of the work cost them, provided they paid only the currrent rates; and the error committed in excluding evidence of the actual cost at current rates will not be cured by admitting afterwards the opinions of experts as to the probable cost.—*Ibid.*

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CERTIFICATE.

See EVIDENCE, 11: SERVICE OF PROCESS, 2: TAXATION, 2.

CERTIFIED COPY.

See EVIDENCE, 32.

CERTIORARI.

1. Error, and not *certiorari*, is the proper remedy to bring up for review an order of the circuit court in dismissing, on motion, for want of jurisdiction, a writ of *certiorari* from that court to a circuit court commissioner for the review of proceedings under the statute to recover possession of land.—*Robens v. Videto, 240.*
2. *Certiorari* to review proceedings to remove an encroachment upon an asserted highway, will not be dismissed on the ground that the plaintiff in the writ does not appear by the record technically and formally as an original party, when it is apparent he has rights which were affected by the proceedings, and that he was treated and recognized throughout as a substantial party.—*Campau v. Button, 525.*

See PRACTICE IN CIRCUIT COURTS, 8, 10.

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CHANCERY APPEALS.

See EQUITY PLEADING AND PRACTICE, 5–7, 10, 16: PRACTICE IN SUPREME COURT, 4.

CHANCERY SALES.

1. Where a defendant in a foreclosure suit has bid off the lands at the sale and asked for time to produce the money, and two days' time is given him and the sale is held open for the purpose and public announcement thereof made at the time, but he fails to make good his bid, and the sale is thereupon, at the time to which it was held open, proceeded with and the premises struck off and deeded to another, such latter sale will not be set aside at the instance of such defendant as matter of strict right and in the absence of any showing of equities, for the reason that it was made after the time when by the published notice the sale was advertised to take place.—*Isbell v. Kenyon, 63.*
2. Under a decree authorizing a sale of lands by a commissioner upon public notice "according to the course and practice" of the court, "in such convenient and reasonable parcels" as in his opinion should be most conducive to the interest of all the parties, a sale upon a notice which fails to give any description of the lands, and by putting up and striking off numerous distinct bodies upon one offer and bid, is unwarranted and illegal.—*Griswold v. Fuller, 268.*
3. A trustee in whose name a mortgage was taken to secure the payment of separate claims of several creditors of the mortgagor is held not to have authority to bind objecting creditors by a purchase on the foreclosure of the entire property for the joint benefit of all; neither could a majority of the creditors coerce the others into any arrangement for buying the lands at the foreclosure sale.—*Bradley v. Tyson, 337.*
4. The trustee having in good faith made the purchase, not on his own behalf, but in pursuance of what he seems to have deemed to be his duty to his *cestuis que trust*, a conditional order is granted for a re-sale at the option of those creditors objecting to the purchase as one made on their behalf.—*Ibid.*
5. One who has received the title to lands under an arrangement which in legal effect made his rights no more than those of a mortgagee, is not thereby precluded from becoming a purchaser at a chancery sale on the foreclosure by a third person of another mortgage, and holding the title like any other purchaser; and such a purchase would cut off all previous equities of the other party.—*Moote v. Scriven, 500.*

See EQUITY JURISPRUDENCE, 8–10.

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CHANGE OF LOCATION.

See VOLUNTARY SUBSCRIPTIONS, 7.

CHANGE OF VENUE.

See SUPERVISORS, 1, 2.

CHARACTER.

Of prosecutrix: See CHARGE TO THE JURY, 7.
See EVIDENCE, 10.

CHARGE TO THE JURY.

1. Instructions to the jury which are not liable to mislead them as to their powers or duties, will not be reviewed in reference to their spirit or style as bearing with severity against the party complaining of them.—*Elliott v. Van Buren, 49.*
2. An instruction to the jury, in regard to a billiard table seized on an attachment, that if they found that under the term "billiard table" was ordinarily included the cloth, balls and other things necessary to its use, they might regard them as covered by the inventory on the attachment levy, which only mentioned "one billiard table," provided they found they were in fact included in the seizure, is misleading and erroneous where there was no evidence tending to show that any property was attached except the disjointed table.—*Hunt v. Strew, 85.*
3. Where a request to charge is not presented separately, but is coupled with another which is erroneous, the refusal of the whole is not error, though the former, standing alone, was proper to be given.—*Westchester Fire Ins. Co. v. Earle, 143.*
4. The court in charging the jury is not bound on request to present the case to them for consideration on the evidence of one of the witnesses only, or to put to them any proposition which will confine their attention to one witness more than another; while this may sometimes be done in a plain case without error, it is not error to refuse to do it.—*Ibid.*
5. It is not error to refuse to grant requests to charge where all the points involved in the several requests which are proper to be given are covered by the general charge given by the court.—*Lott v. Sweet, 308.*
6. The submission to the jury in a trial for rape of the question whether the accused put the prosecutrix in such fear as to preclude her from offering resistance, is held not error.—*Turner v. People, 363.*
7. A proposition in a charge to the jury in a rape case, that it made no difference what the complaining witness did before

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or since the act if the defendant committed the crime as alleged, is construed, in connection with the rest of the charge, which explicitly submitted to the jury the question of the credibility of the prosecutrix and the reasonableness and probability of her testimony, to mean no more than that if the imputed fact was committed it was equally a rape whether the character of the prosecutrix was good or bad, and so construed is held not to be error.—*Ibid.*

See EJECTMENT, 1: EVIDENCE, 9, 28, 29: EXCEPTIONS: PRACTICE IN SUPREME COURT, 8: REPLEVIN, 2.

CHARTER.

See ORDINANCES: WARRANT.

CHASTITY.

See SEDUCTION, 3, 8.

CHATTEL MORTGAGES.

Where a chattel mortgagee has made a distinct arrangement with a subsequent purchaser of the property who has assumed the payment of the mortgage, extending the time of payment four days to a day named, and appointing a specified place of payment, he is not justifiable in seizing the property without cause before the designated day; and payment at the appointed place on the day named will operate as a satisfaction of the mortgage.—*Baxter v. Spencer, 325.*

See FRAUDULENT TRANSFERS, 1: REPLEVIN, 7, 8.

CHECKS.

See FINDING OF FACTS, 1.

CHICAGO FIRE.

See RAILROADS, 1-3.

CHURCHES.

See BUILDING CONTRACTS, 4.

CIRCUITY.

See MULTIPLICITY OF SUITS.

CITIES.

See COMMON COUNCIL: EJECTMENT, 3, 4: MUNICIPAL BOARDS, 1-3.

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CLAIMS.

Against a county: See SUPERVISORS, 1, 2.
Against estates: See ESTATES OF DECEASED PERSONS, 1, 2.

CLERK.

See REMOVAL OF COUNTY SEAT, 1.

CLIENT.

See FRAUD, 8–11.

CLOSED.

See SUNDAY LIQUOR LAW, 1.

COGNATE SUBJECTS.

See SUNDAY LIQUOR LAW, 4.

COLLATERAL ATTACK.

See JUDGMENT, 3, 4.

COLLATERAL INQUIRY.

See EVIDENCE, 2, 3.

COLLATERAL SECURITY.

See PROMISSORY NOTES, 7.

COLLECTION ROLL.

See TAXATION, 2, 8–12.

COLLUSION.

See ESTOPPEL, 3: EVIDENCE, 15.

COMMENCEMENT.

Of prosecution: See SEDUCTION, 12.
Of service: See EXECUTION LEVY, 7–10.

COMMON CARRIERS.

See CORPORATIONS, 3, 7, 8: RAILROADS, 1–5.

COMMON COUNCIL.

As a general rule the common council of a city should be allowed to determine what taxes ought to be levied for city purposes,

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and there ought to be no interference with its discretion by the courts except on the most imperative reasons.—*Water Commissioners v. Common Council of East Saginaw, 164.*
See MANDAMUS, 1: MUNICIPAL BOARDS, 1–3: TAXATION, 7.

COMMON COUNTS.

See DECLARATION, 1, 4: PRACTICE IN CIRCUIT COURTS, 4.

COMMON-LAW REMEDY.

See DISTRESS DAMAGE FEASANT, 1.

COMMON OBSERVATION.

See EVIDENCE, 21–23.

COMPENSATION.

See EQUITY PLEADING AND PRACTICE, 12: TROVER, 1.

COMPETITION.

See EQUITY JURISPRUDENCE, 11: EXECUTION SALES, 14.

COMPLAINTS.

See ARRAIGNMENT: CRIMINAL COMPLAINTS, 1–3: EVIDENCE, 5.

COMPLETING LEVY.

See EXECUTION LEVY, 2, 7–10.

COMPLETION OF WORK.

See BUILDING CONTRACTS, 7: VOLUNTARY SUBSCRIPTIONS, 1–4.

COMPOUNDING CRIMINAL COMPLAINTS.

See EVIDENCE, 39–42.

COMPROMISES.

Of criminal prosecutions: See PROMISSORY NOTES, 8, 9.
See SETTLEMENTS.

COMPULSORY NOVATION.

See GARNISHEE PROCEEDINGS, 4.

CONCEALMENT.

See ARBITRATION, 2: FRAUD, 1, 3.

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CONCERT OF ACTION.

See FRAUD, 2.

CONCESSIONS UNDER PROTEST.

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CONDITIONAL DEPOSITS.

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CONDITIONAL PROMISES.

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CONFIRMATION.

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CONFLICTING CLAIMS.

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CONFLICT OF TESTIMONY.

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CONSENT.

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CONSERVATOR OF THE PEACE.

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CONSIDERATION.

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CONSOLIDATION.

See CORPORATIONS, 2.

CONSPIRACY.

See FRAUD, 2: SEDUCTION, 10.

CONSTITUTIONAL LAW.

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CONSTRUCTION.

See CHARGE TO THE JURY, 7: CONTRACTS, 7, 13: CORPORATIONS, 4: EXECUTION SALES, 9: GUARANTY, 1–3: INSURANCE, 2, 3: LOG-LIEN LAW, 2: MORTGAGES, 7: SALES OF GOODS, 5, 6: SUNDAY LIQUOR LAW, 1.

CONTEMPT.

See EQUITY PLEADING AND PRACTICE, 10–12.

CONTRACTORS.

See BUILDING CONTRACTS, 1–7.

CONTRACT RELATIONS.

See AGENCY, 1: LANDLORD AND TENANT.

CONTRACTS.

I. Wixson, with others, subscribed an agreement circulated by Haywood, whereby such subscribers undertook and agreed with John Sinclair & Co. to take the shares subscribed by them respectively in a petroleum company which the contract stated was being formed by said Sinclair & Co. to develop a part

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of the Clark farm on Pithole creek and a branch of the same, Wixson subscribing for one share and paying therefor to Haywood one hundred dollars; this contract was signed only by the subscribers for stock, and no signature was appended on the part of Sinclair & Co. Haywood signed and delivered to Wixson a receipt for the one hundred dollars, which recited that the latter is "entitled to certificate of one share of stock," etc., "in accordance with the terms of the subscription to which said Wixson's name is attached."

Held, 1. That Haywood was not liable to Wixson under a special count upon a contract to furnish and deliver to Wixson, in consideration of said subscription and of the payment of the one hundred dollars, the stock called for by the subscription, in the absence of any showing that Haywood was a member of the firm of Sinclair & Co., or that any company had in fact been organized by said firm as contemplated by said subscription paper; that the paper signed by Haywood does not promise that a company shall be formed, nor does it make Haywood a party to the undertaking on behalf of Sinclair & Co. in the subscription paper to form one.

Held, 2. That the receipt by Haywood of the money paid by Wixson on such subscription, under the circumstances, does not make him liable to Wixson under the general count for money had and received.—*Wixson v. Haywood*, *68*.

2. A written bargain is of no higher legal degree than a parol one, and either may vary or discharge the other; and one who has agreed that he will only contract by writing in a certain way, does not thereby preclude himself from making a parol bargain to change it; and there is no more force in an agreement in writing not to agree by parol, than in a parol agreement not to agree in writing.—*Westchester Fire Ins. Co. v. Earle*, *143*.

3. Where an agent takes in Michigan a verbal order for goods and transmits it to his principals in Ohio for approval, and the latter there approve it and consign the goods to a common carrier in Ohio, and the vendee accepts the goods in Michigan, paying the freight, the contract is an Ohio contract, and not a Michigan one; and though the goods be intoxicating liquors, the transaction is not within the Michigan statute.—*Kling v. Fries*, *275*.

4. At the common law a contract for the sale of goods, where nothing remains to be done by the seller before making delivery, transfers the right of property, though the price has not been paid, nor the thing sold delivered to the purchaser.—*Ibid.*

5. Illegality will not be presumed; nor will it be presumed, as against the validity of a contract, and in the absence of proof,

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that the statutes of another state have provisions similar to those of Michigan, and in derogation of the common law.—*Ibid.*

6. It will not be presumed, in the absence of evidence or finding, that parties making a sale in another state, where it was presumably valid, of liquors to be transported to Michigan, intended thereby to assist the purchaser in violating the Michigan statute.—*Ibid.*

7. While there are cases where a contract in restraint of trade, general in its terms as to the place or extent of territory over which it should extend, may, in the light of all the surrounding circumstances, be so construed that effect can be given to it, yet it is not always easy or safe to thus construe and then enforce such a contract; especially where there is no certainty that the contract as thus construed and limited was the one the parties had in mind and intended to provide for in their agreement.—*Caswell v. Gibbs*, *331.*

8. A contract made in another state for the sale of liquors to be delivered in Michigan, such as would be valid at common law, and which is not shown to be invalid where made, cannot be held void by virtue of the prohibitory liquor law of Michigan.—*Roethke v. Philip Best Brewing Co.*, *340.*

9. S, in possession of a store by virtue of a lease to himself and another, made an agreement with C, to permit C to occupy the store jointly with S, in consideration of C's furnishing and keeping up a stock of goods to belong exclusively to C, which both were to manufacture and sell, and paying to S as compensation for his services half the net profits:—

Held, That this agreement did not obligate C to pay rent except inferentially as a part of a joint occupancy and as expenses of business; that the remedy for a breach on C's part was an action for damages, and not one for use and occupation; that it made no promise to pay rent to S; and that S could not assign any claim under it for rent or for use and occupation, or for any thing not distinct and severable.—*Carver v. Palmer*, *342.*

10. A defendant is not at liberty, for the purpose of turning the plaintiff out of court, to set up and claim the benefit of a contract which he concedes he refused to regard and expressly repudiated.—*McQueen v. Gamble*, *344.*

11. Where an order is sent by mail from Detroit to Chicago, in pursuance of which intoxicating liquors are there shipped to the person giving the order, and are afterwards received by him at Detroit, the contract is an Illinois contract and presumably valid, and it is not affected by the Michigan statute. —*Webber v. Donnelly*, *469.*

12. Mere knowledge on the part of the vendor, that his vendee

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at the time of the purchase of property intends to use it for an illegal purpose, will not prevent his recovering from the vendee the value of the property.—*Ibid.*

13. The fact that an agreement between parties mentions another agreement between one of them and a third person, and uses the same language in part, quoting so much as was pertinent, does not necessitate their being read together if not so intended, and where each stands on its own basis and is capable of being construed and enforced independently.—*Barry v. Davis, 515.*

See BUILDING CONTRACTS, 1–7: DECLARATION, 1, 2, 4: DEEDS, 1–5: EQUITY JURISPRUDENCE, 11: ESTATES OF DECEASED PERSONS, 1, 2: FRAUDULENT TRANSFERS, 1, 2: GUARANTY, 1–8: INSURANCE, 4: PROMISSORY NOTES, 9: RAILROADS, 6, 10, 11: REPLEVIN, 4, 6: SALES OF GOODS, 1–7: SPECIFIC PERFORMANCE, 1, 2, 4–11: SWAMP LANDS, 1–5.

CONTRIBUTION.

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See ADJOINING PROPRIETORS, 1.

CONTROL OF STREETS.

See EJECTMENT, 4.

CONVERSATIONS.

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See FRAUD, 5: TROVER.

CONVEYANCE.

See EJECTMENT, 2.

COPY.

See TAXATION, 2.

CORPORATE EXISTENCE.

See RAILROADS, 7.

CORPORATE SHARES.

See EXECUTION LEVY, 4–6, 10: EXECUTION SALES, 3–14.

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CORPORATIONS.

1. One who is named as a director in the articles of incorporation, and who has acted as such, cannot be removed by parol, or by the individual action of other directors; and proceedings by the board without notice to declare the office vacant are without jurisdiction.—*Copland v. Directors of Minong Mining Co.*, 2.
2. A person who is once entitled to stock in a corporation can only be deprived of it by transfer, or by such forfeiture for non-payment of lawful assessments as is authorized by law; and a stockholder in one of two mining companies which are consolidated becomes by the consolidation under the statute (*Comp. L. 1871*, §§ *2892-5*) a stockholder in the new company. —*Ibid.*
3. The claim of a passenger who has been injured by the negligence of the agents of a corporation carrier, is not one which, after judgment against the company and execution returned unsatisfied, affords a ground of action against the stockholders under our statute.—*Comp. L. 1871*, §§ *2478-80.*—*Bohn v. Brown*, *257.*
4. The statute in question is to be construed in accordance with the natural and ordinary sense of the language used.—*Ibid.*
5. It was not the design of this statute to make every judgment against the company, for whatever cause, a ground of action against the stockholder, but the cause of action against the stockholder is made identical with that against the company, and the proceedings against the company, in case it is not dissolved, are mere matters of inducement.—*Ibid.*
6. Where the case is a proper one for sustaining the liability of the stockholder, it seems that the judgment against the corporation, if obtained without fraud or collusion, is conclusive and binding upon the stockholder, as to the fact and the extent of the liability of the company, but the questions whether the cause of action adjudicated was of a nature to involve the stockholder under the statute, and whether the conditions as to ownership of stock, and the fact of such ownership at the times specified, existed, should be considered open.—*Ibid.*
7. The nature of the demands against the corporation which will support the action against the stockholders, except where dividends are improperly declared or paid, is limited by the statute to claims for labor performed and for debts contracted, and this excludes all others; and no claim founded on pure tort is within the statute.—*Ibid.*
8. The liability of a carrier for an injury to one of its passen-

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gers, caused by the negligence of its agent, though the grievance be one for which the passenger was at liberty to sue either in *assumpsit* for the breach of the contract to carry safely, or specially on the case upon the negligence of the carrier, is one the real gist of which is the wrongful act of the carrier, and is in its essential ingredients one based upon the tort; and it is not, therefore, within the meaning of the statute in question, a "debt contracted."—*Ibid.*

See EVIDENCE, 2: EXECUTION LEVY, 4–6, 10: EXECUTION SALES, 3–14: GARNISHEE PROCEEDINGS, 1, 2: RAILROADS, 1–11; REMEDY: SERVICE OF PROCESS, 3, 4: VOLUNTARY SUBSCRIPTIONS, 2.

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See BUILDING CONTRACTS, 7.

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See PRACTICE IN CIRCUIT COURTS, 3: PRACTICE IN SUPREME COURT, 2, 13.

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See EQUITY JURISPRUDENCE, 4–6.

COUNCILMAN.

See ATTORNEY.

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See MULTIPLICITY OF SUITS.

COUNTER PUBLICATIONS.

See LIBEL, 6.

COUNTY.

See GARNISHEE PROCEEDINGS, 7: SUPERVISORS, 1, 2.

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See REMOVAL OF COUNTY SEAT, 1–4.

COUPLING CARS.

See EVIDENCE, 18: RAILROADS, 12.

CREATING A TERM.

See SWAMP LANDS, 4.

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CREDIBILITY OF WITNESSES.

See EVIDENCE, 7, 10, 37.

CREDITORS.

See DEEDS OF GIFT, 1, 2: EQUITY JURISPRUDENCE, 7-10: FRAUDULENT TRANSFERS, 2: HOMESTEAD.

CRIMINAL COMPLAINTS.

1. A complaint for the arrest of one charged with an offense not cognizable by a justice is not required to set forth with precision and in formal and distinct terms the exact criminal act to be inquired into and prosecuted; the complaint is not designed to fix and control the after proceedings as to the title of the offense or the date of it; but it is the examination on oath which immediately follows, and is required as a consequence of the complaint, that is to guide the magistrate in deciding whether a warrant ought to issue, and if so, for what.—*Turner v. People*, *363*.
2. A complaint and examination which, though informal and inartificial, contains the substance of a charge upon oath that the accused committed the crime of rape on complainant, at a place named, on or about January 4, 1873, and also between January 20, 1873, and September 30, 1874, is sufficient to authorize the magistrate, and to make it his duty, to issue a warrant for the arrest of the accused.—*Ibid.*
3. And upon the arrest of one thus accused, it is competent and the duty of the magistrate to inquire, on the preliminary examination of the prisoner, in regard to the commission of the offense on any particular occasion between January 20, 1873, and September 30, 1874.—*Ibid.*

See FALSE IMPRISONMENT, 4.

CRIMINAL LAW.

See ARRAIGNMENT: EVIDENCE, 36, 37: INFORMATIONS, 1-3: ORDINANCES: PRELIMINARY EXAMINATIONS, 1, 2: SEDUCTION, 1-12: SUSPENDED SENTENCE: VERDICT: WAIVER: WARRANT.

CRIMINAL TRIALS.

See SUPERVISORS, 1, 2.

CROSS-EXAMINATION.

The cross-examination of a witness cannot properly be confined strictly to the precise subjects called to his attention in his

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direct examination, but should be allowed to extend to any matter not foreign to the subject matter of such examination, and tending to limit, explain or modify the same.—*Haynes v. Ledyard, 319.*

See ESTATES OF DECEASED PERSONS, 2.

CUSTODY OF BOOKS AND PAPERS.

See EXECUTION LEVY, 4, 6.

CUTTING TIMBER.

See LAND CONTRACTS.

DAMAGES.

See ASSAULT AND BATTERY, 2, 3: BUILDING CONTRACTS, 3-7: CONTRACTS, 9: CORPORATIONS, 3, 7, 8: EXEMPLARY DAMAGES, 1, 2: FALSE IMPRISONMENT, 3, 6: FRAUD, 5: HIGHWAYS, 1, 2: LAND CONTRACTS: LIBEL, 7: PRACTICE IN SUPREME COURT, 13: TROVER.

DANGEROUS IMPLEMENTS.

See MASTER AND SERVANT, 2-4.

DEBT OR DEFAULT OF ANOTHER.

See GUARANTY, 8.

DEBTORS.

See EXECUTION SALES, 14.

DEBTS CONTRACTED.

See CORPORATIONS, 3-8.

DECEASED PERSONS.

See ESTATES OF DECEASED PERSONS, 1, 2: EVIDENCE, 25.

DECEIT.

See FRAUD, 3, 6, 7.

DECLARATION.

1. The common counts in assumpsit are not adapted to the recovery upon a promise to pay a given sum of money in consideration of the plaintiff's deeding to defendants certain land to be by them turned over to a third person for land the latter was to convey to a railroad company for depot grounds.—*Mace v. Page, 38.*

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2. In an action upon such a promise against two jointly, where the evidence wholly fails to show any such promise or undertaking as to one of the defendants, or to connect him in any way with the contract declared upon as a joint undertaking, the plaintiff cannot prevail.—*Ibid.*
3. The use of the term "assignee," etc., after the name of the plaintiff in a declaration in trover, does not of itself authorize the conclusion that the declaration purports to be for a cause of action that had accrued to the assignors by a conversion prior to the assignment, and claimed to have passed by the assignment to the plaintiff; but this expression is to be treated as mere *descriptio personæ.—Bloom v. Sexton, 181.*
4. Where plaintiff had performed for defendant services shown to be worth more than plaintiff had received for them, and for which no bargain was made as to price, except one which the defendant shortly after repudiated and refused to regard, it was held error to rule that no recovery could be had on the common counts, and that the action should have been brought on the contract.—*McQueen v. Gamble, 344.*

See ASSIGNMENT: EVIDENCE, 5: HIGHWAYS, 1: LOG-LIEN LAW, 3, 4: PROMISSORY NOTES, 5, 6: RAILROADS, 10, 11.

DECREE.

See CHANCERY SALES, 2: EQUITY JURISPRUDENCE, 7: EQUITY PLEADING AND PRACTICE, 4, 5, 9, 15, 17, 18: PURCHASERS UNDER DECREE.

DEEDS.

1. The acceptance by the grantee of a deed conveying lands subject to a specified mortgage, and providing that he shall assume and pay said mortgage, binds him as effectually as though the deed were *inter partes*, and executed by both grantor and grantee; and such a proviso in a deed is to be treated, after acceptance by the grantee, as an express agreement on his part to assume and pay the mortgage specified.—*Crawford v. Edwards, 354.*
2. The obligation of a purchaser who, in and by such an agreement in the deed he accepts, assumes and agrees to pay a specified mortgage, enures in equity to the benefit of the mortgagee, who may enforce it against such purchaser in a bill to foreclose his mortgage.—*Ibid.*
3. The mortgagee may treat both the mortgagor and his grantee under such a promise as principal debtors, and may have a personal decree against either or both; and this upon the principle that the creditor is entitled to the benefit of all collateral obligations for the payment of the debt.—*Ibid.*

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4. A grantee who has accepted such a deed cannot avoid liability under his agreement to pay the mortgage, on the ground that by reason of a mistake in the description of the premises he acquired no legal title, where he obtained possession under his deed of the proper premises, and the right by virtue thereof to have the mistake corrected, but instead of availing himself of that right permitted the premises to be fraudulently conveyed and delivered to a third person in order to cut off the mortgage.—*Ibid.*
5. Nor is he at liberty to show in defense that the mortgage he has assumed and agreed to pay was without consideration, and therefore not a valid claim against his grantor; the latter having seen fit to waive any defense he may have had to the mortgage, and having appropriated a portion of the purchase price coming to him to the payment thereof, his grantee is precluded from assailing its validity.—*Ibid.*

See EVIDENCE, 11: FORECLOSURES, 5; TAX TITLES.

DEEDS OF GIFT.

1. One who owns lands subject to a contract to sell and convey the same to his wife, upon which a part of the purchase price remains unpaid, cannot, pending suit against him and on the eve of the judgment, make a valid deed of gift of his interest in the lands to his wife to defeat an execution levy.—*Doak v. Runyan, 75.*
2. A wife who is under contract to purchase lands of her husband can claim no equities by virtue of a deed of gift of the lands, as against an execution levy upon the husband's interest, where the amount she still owed on the contract when she received the deed exceeded the amount required to satisfy the execution.—*Ibid.*

DEFAULTS.

See AMENDMENTS: GARNISHEE PROCEEDINGS, 2: PRACTICE IN CIRCUIT COURTS, 6.

DEFECTS.

See AMENDMENTS.

DEFENSES.

See DEEDS, 4, 5: EVIDENCE, 43: PROMISSORY NOTES, 8, 9: SETTLEMENTS.

DEFINITENESS.

See INSURANCE, 2.

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DELAY.

See BUILDING CONTRACTS, 3–7: EVIDENCE, 36, 37: RAILROADS, 1–5: SPECIFIC PERFORMANCE, 4, 7, 9.

DELIVERY.

See CONTRACTS, 4: MORTGAGES, 4–6: RAILROADS, 10, 11: SALES OF GOODS, 7–9.

DEMAND.

See INTEREST, 2: REPLEVIN, 7, 8.

DEMURRER.

See EJECTMENT, 3: PRACTICE IN CIRCUIT COURTS, 1.

DENIAL.

See EVIDENCE, 44: LOG-LIEN LAW, 4.

DEPOSITS IN ESCROW.

See MORTGAGES, 4–6.

DEROGATION OF COMMON LAW.

See DISTRESS DAMAGE FEASANT, 1.

DESCRIPTION.

See CHANCERY SALES, 2: TAXATION, 3.

DESCRIPTIO PERSONÆ.

See DECLARATION, 3.

DESPATCH.

See RAILROADS, 1–5.

DETROIT.

See TAX LEASE.

DEVISE.

See WILLS, 1–3.

DILIGENCE.

See NEGLIGENCE, 1, 2: RAILROADS, 1–5.

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DIRECTORS.

See CORPORATIONS, 1.

DISCHARGE.

See GUARANTY, 5.

DISCLAIMER.

See ESTOPPEL, 1.

DISCLOSURE.

See GARNISHEE PROCEEDINGS, 1-3.

DISCOUNTS.

See AGENCY, 3.

DISCRETION.

See COMMON COUNCIL: DIVORCE, 1: EQUITY PLEADING AND PRACTICE, 7, 8: MANDAMUS, 2: MUNICIPAL BOARDS, 3: PRACTICE IN CIRCUIT COURTS, 8.

DISCRIMINATION.

See RAILROADS, 3.

DISINTEGRATION OF MORTAR.

See ADJOINING PROPRIETORS, 1-6: EVIDENCE, 21-23.

DISMISSAL.

See CERTIORARI, 1: EQUITY PLEADING AND PRACTICE, 18:

DISPOSSESSION.

See SPECIFIC PERFORMANCE, 7, 8.

DISPUTED CLAIM.

See LIQUOR TAX, 2.

DISPUTING RETURN.

See PRACTICE IN CIRCUIT COURTS, 9.

DISSOLUTION.

See EVIDENCE, 31.

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DISTINCT ACTS.

See SEDUCTION, 1.

DISTINCT AGREEMENTS.

See CONTRACTS, 13.

DISTRAINED ANIMALS.

See DISTRESS DAMAGE FEASANT, 1, 2: RESCUE, 1, 2.

DISTRESS DAMAGE FEASANT.

1. The right of distress damage feasant existed at common law and is not a creature of the statute, though legislation has been adopted to regulate its exercise; so that it is inaccurate to speak of this remedy as something merely statutory and in derogation of the common-law rights of property.—*Hamlin v. Mack*, *103.*
2. The taking of another's beast when trespassing on the taker's land, and confining it in his barn, is sufficient to constitute a lawful distress damage feasant.—*Ibid.*

DIVIDED COURT.

See PRACTICE IN SUPREME COURT, 10.

DIVORCE.

A separation of husband and wife by the latter going to her father's, to constitute a basis for divorce under our statute upon the ground of desertion, must have commenced at least two years prior to the filing of the bill and continued during the whole period without interruption; and mutual treaties and deliberations within that period with a view to living together again are inconsistent with the kind of desertion the statute has in view as a ground of divorce.—*Rudd v. Rudd*, *101.*

DOCUMENTARY EVIDENCE.

See EVIDENCE, 32: PRACTICE IN SUPREME COURT, 9.

DOLLAR MARK.

See TAXATION, 1.

DOUBLE PROPOSITION.

See CHARGE TO THE JURY, 3.

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DOUBTFUL TITLE.

See SPECIFIC PERFORMANCE, 3.

DRUNKARDS.

See SUNDAY LIQUOR LAW, 2–4.

EAVES TROUGH.

See ADJOINING PROPRIETORS, 6.

EIGHT PER CENT MORTGAGE.

See BUILDING CONTRACTS, 5, 6.

EJECTMENT.

1. In an action of ejectment against two defendants it is error to direct a verdict for plaintiff where the testimony tends to show that there was no joint occupation, or fails so clearly to show joint occupation that the jury would not be warranted in finding that each held what he occupied to the exclusion of the other.—*Murphy v. Campau, 71.*
2. Rejecting on offer to show by parol, in an action of ejectment, that some arrangement existed whereby third parties were to have some interest in the land, is not error where no offer was made to prove a deed, and no foundation was laid for giving parol evidence of any conveyance or agreement; since nothing but a conveyance of the legal title could defeat an action of ejectment.—*Conrad v. Long, 78.*
3. A city has not such a valid subsisting interest in the lands embraced in its streets as will authorize it to maintain ejectment under our statute; and the disability is a fundamental one and is not required to be raised by demurrer or plea in abatement.—*Grand Rapids v. Whittlesey, 109.*
4. The charter provision conferring upon the city the supervision and control of its streets was not designed to give the right to maintain ejectment, nor any thing more than the usual power possessed by township officers over country ways, to care for them and keep them in repair and to prevent and remove encroachments and obstructions.—*Ibid.*

See EVIDENCE, 11: MORTGAGES, 3: RES ADJUDICATA, 2.

ELECTION.

See SEDUCTION, 1: SPECIFIC PERFORMANCE, 2: TROVER, 3.

ELECTIONS.

1. One who has first by mistake voted in the wrong precinct, and upon discovering his mistake has requested and procured

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the inspectors to withdraw and cancel a ballot such as he asserted he had voted, has no right afterwards to vote again in his proper precinct; and his second vote is illegal.—*Harbaugh v. Cicott, 241.*

2. Inspectors of election have no authority, on the assertion of one who claims to have voted by mistake in the wrong precinct, to withdraw from the ballot box and destroy a ballot which he identifies as the one, or similar to the one he had voted.—*Ibid.*
3. The presumption of qualifications as a voter, arising from the registry, covers all the essential requisites to a right to vote, including residence within the ward the necessary time. —*Ibid.*
4. The temporary absence of a person or his family, though extending over a series of years, does not necessarily, without regard to his intentions, make him lose his residence, or deprive him of his rights as an elector.—*Ibid.*

See EVIDENCE, 24: SPECIAL QUESTIONS TO JURY, 4–10.

ELECTORS.

See ELECTIONS, 1–4: SPECIAL QUESTIONS TO JURY, 4, 6–10.

EMPLOYES.

See EMPLOYMENT: EVIDENCE, 18, 44: MASTER AND SERVANT, 1–4: RAILROADS, 12.

EMPLOYMENT.

Where there was evidence tending to show a promise made by an authorized agent of defendant to pay plaintiff a given sum for his services, and the facts have been properly submitted to the jury, who have found for the plaintiff, their verdict is final and conclusive.—*Wyman v. Crowley, 84.*

See ATTORNEY: PRACTICE IN CIRCUIT COURTS, 4.

ENCROACHMENTS.

See CERTIORARI 2: HIGHWAYS, 3.

ENTIRE INTEREST.

See EXECUTION SALES, 6, 10–14.

EQUITABLE INTERESTS.

See EXECUTION SALES, 10.

EQUITABLE RIGHTS.

See EQUITY JURISPRUDENCE, 10.

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EQUITY JURISPRUDENCE.

1. A court of equity has no jurisdiction to restrain the threatened violation of a village ordinance, unless the act threatened to be done would, if carried out, be a nuisance; and the erection of a wooden building within the limits of a city or village is not in and of itself a nuisance, nor does the fact that it is prohibited by ordinance make it such.—*St. Johns v. McFarlan, 72.*
2. The increased risk of fire and consequent danger to adjoining property from the erection of a wooden building in a thickly settled portion of a village, does not warrant a court of equity in interfering by injunction to restrain the erection.—*Ibid.*
3. It cannot be said that there is no adequate remedy at law because the ordinance in question is not sufficiently stringent, since it is competent for the legislature to give the village ample power to establish fire limits and enforce obedience thereto, and with a proper ordinance, framed with an appropriate penalty for all violations, the remedy would be found adequate.—*Ibid.*
4. Where after judgment and execution levy against sureties upon a bond, two of the sureties pay the judgment in full, but the levy against their co-surety is retained for their benefit, they may join in a bill in aid of the execution to remove conveyances made by such co-surety in fraud of such execution levy, to the end that it may be made available to them by way of subrogation to enforce contribution; though their claims for contribution are several, yet the levy being neither divisible nor apportionable, the relief sought, so far as it turns on the subjection and enforcement of this lien, is necessarily joint.—*Smith v. Rumsey, 183.*
5. The objection that the case is properly cognizable at law, and not in equity, is held not well founded.—*Ibid.*
6. The payment of the judgment in such case by the two sureties, with the intent to avail themselves by way of subrogation of the lien of the execution against their co-surety to enforce contribution, would not operate in equity to annihilate the debt or destroy the force of the levy as between them and such co-surety; but a court of equity will keep the debt alive and preserve the security of the levy to the extent of the lawful claim for contribution as against the co-surety, and will enforce the right of subrogation.—*Ibid.*
7. Where a conveyance of land which embraces an undefined homestead interest and something besides, is assailed in equity as fraudulent as against creditors, the decree setting it aside as to so much as is not exempt as a homestead, should provide for an admeasurement and setting off of the homestead

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according to the situation and value at the date of such conveyance.—*Ibid.*

8. A bill to remove a cloud from the title to lands, which deduces complainant's title through a judicial sale, cannot be sustained where the proceedings which were the basis of such sale, and upon which the validity of complainant's title depends, are shown to be void for jurisdictional defects.—*Griswold v. Fuller, 268.*

9. Courts of equity have no authority, upon a bill by a judgment creditor alleging that his debtor became vested with the legal title to lands, and that by certain subsequent void proceedings an ostensible but invalid title, which was a mere cover and not a valid interest, had been conferred on third persons named, who in law held only as trustees for such debtor, in the absence of any averment or showing of an execution levy upon the lands in his favor, to decree the sale of such lands for the satisfaction of the judgment.—*Ibid.*

10. While mere equitable rights and titles may in suitable cases be made available by a direct proceeding in equity to satisfy judgments, through a receiver or otherwise, the transfer of the legal title to land, through the immediate power of the court, where no lien has been previously obtained, in order to satisfy judgment creditors, is not an attribute of the traditionary jurisdiction of equity, nor is any such authority conferred by our statutes.—*Ibid.*

11. An agreement to "never tow vessels in competition" with complainants, or either of them, is too uncertain and indefinite to be enforced by injunction, since every case of alleged violation would involve the consideration of the questions of fact, depending on the peculiar circumstances of each case, whether there was in fact any competition, whether complainants at the time were furnishing sufficient facilities, and what ought to be considered sufficient facilities.—*Caswell v. Gibbs, 331.*

12. A debtor cannot be relieved in equity of a debt he honestly owes, by reason of his creditor having made such an alteration in a security as may prevent his enforcing it according to its terms. He who seeks equity must be prepared to do equity.—*Goodenow v. Curtis, 505.*

See ARBITRATION, 1-3: ESTOPPEL, 2, 3: FRAUD, 8-11: MISTAKE: MORTGAGES, 3: SPECIFIC PERFORMANCE, 1, 2.

EQUITY PLEADING AND PRACTICE.

1. A complainant in a chancery cause is bound, in order to be entitled to relief, to prove his case substantially as he alleges it.—*Rudd v. Rudd, 101.*

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2. No relief can be granted in equity on evidence establishing a case not made by the bill.—*Ford v. Loomis, 121.*
3. The rule that the court is to adjudge according to the case shown and issues raised by the pleadings is applied in this case.—*Smith v. Rumsey, 183.*
4. It is irregular to dismiss a bill in equity, on motion, for want of jurisdiction, upon grounds required to be supported by proofs, except it be accomplished by way of what may be treated as a final hearing upon pleadings and the facts brought in by stipulation.—*Attorney General v. Supervisors of Lake County, 289.*
5. On appeal from a decree dismissing a bill for want of jurisdiction, questions of regularity of practice will not avail where the appellate court agrees with the court below on the main question of lack of jurisdiction.—*Ibid.*
6. An order confirming a sale on a foreclosure decree is held appealable.—*Detroit Fire & Marine Ins. Co. v. Renz, 298.*
7. Chancery appeals bring the case up for review with all matters of discretion open for consideration in the appellate court, precisely as they were in the court below.—*Ibid.*
8. Under the statute (*Comp. L. 1871, § 5147*) prohibiting a sale in foreclosure cases within one year from the filing of the bill, whether strictly an interval of a year is requisite in all cases between the service of subpœna and the sale, the court has discretionary power at least to postpone the sale until the expiration of a year from the service of subpœna, and should exercise it where the subpœna is not issued until nearly six months after the filing of the bill.—*Ibid.*
9. Good practice requires that a defendant who has appeared in the cause should have such notice of the entry of the decree as to give him an opportunity to attend and be heard upon the settlement thereof.—*Ibid.*
10. An order adjudging one who had been illegally appointed a receiver in a chancery cause guilty of contempt in disobeying an order of the court requiring him to restore to the defendants in said cause all things that had come to his hands as such receiver, is held appealable.—*People v. Jones, 303.*
11. The appointment of such receiver having been determined by the supreme court to be utterly void for want of jurisdiction, it was lawful and proper for the court which made the appointment, to order the property of which the defendants had thus been unlawfully deprived, to be restored to them, that they might be placed as nearly in *statu quo* as the nature of things would permit; and it was competent for the court to enforce such order by proceedings as for contempt.—*Ibid.*
12. One whose appointment as such receiver has been thus finally determined by the court of last resort to be void for want of

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jurisdiction, is not entitled, when ordered to account for and make restoration of the property which thus came unlawfully into his hands, to retain any thing for his services as such officer.—*Ibid.*

13. An order *pro confesso* entered before the proof of service of the subpœna has been made or filed, is premature and irregular.—*Eaton v. Eaton, 305.*
14. Good practice requires an affirmative showing of the non-appearance of the defendant, as a preliminary to an order *pro confesso.—Ibid.*
15. Upon a bill filed to foreclose a mortgage payable in installments at a time when only one installment had become due and remained unpaid, and which seeks a foreclosure for that payment only, a decree covering in addition thereto other installments not yet due when the bill was filed, is unwarranted.—*Smith v. Osborn, 410.*
16. The stenographer's transcript of his notes of the evidence in a chancery cause where the testimony was taken in open court, which has been merely filed in the cause and a copy thereof sent up with the return without being authenticated by the circuit judge as a case settled as required by the statute, will not be considered on appeal as the evidence in the cause.—*Moote v. Scriven, 500.*
17. The proper decree where a mortgagor files a bill to cancel a mortgage past due, and which his adversary is seeking to foreclose and the court finds the mortgage to be valid, is a decree for redemption. Every such bill is regarded as in the alternative a bill to redeem, upon the principle that a complainant seeking equity must be prepared to do equity.—*Goodenow v. Curtis, 505.*
18. The effect of simply dismissing a bill to redeem is an immediate and absolute foreclosure.—*Ibid.*

See CHANCERY SALES, 1, 2: EQUITY JURISPRUDENCE, 7: PRACTICE IN SUPREME COURT, 4, 13: PURCHASER UNDER A DECREE.

ERROR.

See CERTIORARI, 1.

ESCROW.

See MORTGAGES, 4.

ESTATES OF DECEASED PERSONS.

1. An executor or administrator cannot bind the estate by an arrangement with one having a demand against it and also one against a third party, to submit the question of liability and the amount thereof on both demands directly to the circuit court in a single suit.—*Barry v. Davis, 515.*

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2. Where a claimant seeking to recover from an estate for services rendered the deceased in his lifetime has been cross-examined as to whether he had any arrangement as to price with the deceased, with inquiries so framed as to draw out the particulars of the contract of hiring, the party making such inquiries may not afterwards have the evidence stricken out as not responsive in that particular.—*Ibid.*

ESTOPPEL.

1. One who disclaimed ownership and advised an attachment of chattels as the property of another and consented to the levy, is estopped from afterwards setting up a claim of title as against such proceedings.—*Sebright v. Moore*, *92.*
2. Where a party has consented that the legal title to lands should by an absolute conveyance be passed over to another, or discovers that another has fraudulently obtained the legal title and put it in the market, he cannot stand by and see third parties acquire rights upon such apparent legal title and afterwards ask for relief which is purely equitable.—*Ford v. Loomis*, *121.*
3. Whether or not a mortgagor holding by warranty deed, and not ousted or disturbed, ought, in any case, for the purpose of preventing collusion, to be held estopped from setting up an outstanding title by way of defense, this rule will not apply to this case, where no fraud is shown and the equities depend on other considerations.—*Powell v. Conant*, *396.*

See CONTRACTS, 10: INSURANCE, 1, 5, 6.

EVIDENCE.

1. In an action upon a warranty of title free from incumbrances, of a span of horses sold by defendant to plaintiff, it is error to receive in evidence against objection a note and mortgage purporting to be executed by defendant, without any proof of their execution.—*McHugh v. Brown*, *2.*
2. In an action of trover to recover the value of property taken and sold for village taxes, questions of the regularity of the incorporation of the village will not be considered; a private party may not in this collateral way question an assumption of corporate powers which the state does not dispute.—*Bird v. Perkins*, *28.*
3. In such an action evidence that defendant was appointed marshal by a resolution which recites the resignation of his predecessor, and that he proceeded to the discharge of his duties without his right being questioned, so far as appears, is a sufficient *prima facie* showing of his official character as village marshal.—*Ibid.*

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4. The exclusion of an irrelevant instrument between third parties is not error.—*Wright v. Irwin, 32.*
5. The declarations of a sick person made from time to time concerning present sufferings and sensations are admissible to prove the fact of such sufferings and sensations.—*Elliott v. Van Buren, 49.*
6. Unskilled witnesses are not precluded from testifying to facts that came within their own observation relating to ordinary injuries or sickness of those with whom they have consorted, not involving medical knowledge beyond that of ordinary unprofessional persons, by any rule of evidence requiring such facts to be proved by physicians only, for the reason that theirs is the best evidence.—*Ibid.*
7. All considerations concerning the credit due to the witnesses respectively are for the jury only.—*Ibid.*
8. The exclusion of the evidence of the defendant's wife, offered to prove that she knew and approved of the professed purpose for which defendant left his own house to go to that of the plaintiff on the occasion when the grievance complained of is alleged to have occurred, is held not error under the circumstances of this case, there having been no evidence given before to which this would have been responsive, or which it would have tended to disprove.—GRAVES, CH. J., dissenting.—*Ibid.*
9. Where immaterial evidence has been received without objection, instructions to the jury are not open to complaint on the ground that they precluded the jury from giving proper weight to such evidence, for it is not entitled to be given any weight.—*Ibid.*
10. Allowing evidence of plaintiff's bad character to go to the jury in such an action, as bearing upon her credibility as well as upon the question of her consent to defendant's acts, and also upon the damages, is giving it as wide a scope as the defendant is entitled to ask for it.—*Ibid.*
11. Defects in the certificate of the wife's acknowledgment will not exclude the deed as evidence of the transfer of the husband's title in a suit not involving the right of dower.—*Conrad v. Long, 78.*
12. It is not error to permit parol evidence in replevin, for the purpose merely of identifying the transaction, of the fact that the property in question had been taken on an execution, where the contents or validity of the execution is not sought to be shown in that way.—*Hunt v. Strew, 85.*
13. An objection to the introduction in evidence of a justice's judgment and proceedings in a suit commenced by attachment, which only goes to the validity of the service and return of the writ, is not well taken in a suit in which an execution

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levy by virtue of such judgment, as well as the attachment levy, is in issue, where the judgment was rendered on an appearance of the parties, and the attachment contained a personal summons clause; for it points only to the irregularity of a step in no way essential to the jurisdiction of the justice to render the judgment.—*Ibid.*

14. Admissions of a subsequent purchaser, that he had knowledge of the attachment, are admissible in evidence where it is further shown that he admitted also that he had purchased both after and subject to the attachment.—*Ibid.*
15. A statement of the attorney for the defendant in the attachment suit, made at the time the judgment was rendered, that he could defeat the judgment, but had made up his mind not to do so, cannot be shown in evidence for the purpose of showing fraud and collusion of the attorney; for by itself it has no such tendency.—*Ibid.*
16. The admission in evidence of the appraisal in the suit in replevin to prove value is held not error under the circumstances of this case.—*Ibid.*
17. Statements of one's wife made in his absence cannot be shown as evidence to bind him of the facts so stated. Such statements are hearsay.—*Ibid.*
18. A statement made by the mechanic in charge of the shops where the defendant procured its repairs to be made, in reply to complaints made to him of the car in question, that it ought not to be made use of for coupling with the coupler on the other cars, is not evidence of assurances by defendant that its use would be discontinued, and has no tendency to make out a case of culpable negligence on the part of the defendant towards its servants.—*Fort Wayne, Jackson & Saginaw R. R. Co. v. Gildersleeve*, 133.
19. Where a proper question has been allowed against objection, the exception to this ruling will not support an assignment of error directed against the effect of the answer as evidence in going beyond the scope of the question, where no such objection was made, and no exception taken below that would raise that point.—*Burt v. Olcott*, 178.
20. In an action by Isaac N. Gage upon a guaranty of collection by one Reed, of certain promissory notes made by one Cole, it was held competent to admit in evidence the proceedings and judgment against Cole to enforce collection of the notes though those proceedings were taken in the name of Newton Gage as plaintiff, where it is shown that the plaintiff's name is Isaac Newton Gage, and that he is the same person named as Newton Gage in the proceedings against Cole.—*Reed v. Gage*, 179.

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21. The effect of water in disintegrating the mortar of a wall is no more a matter of science than is the effect of a running stream in excavating its banks at its angles; and other persons who have had occasion to observe it, as well as masons, may be competent to express opinions upon it.—*Underwood v. Waldron, 232.*
22. Merely seeing the mortar of a wall disintegrated and destroyed by water, would not alone justify an expression of opinion whence the water came; but if there were other facts indicating that the water came from a particular direction, or must have been applied in a particular way, it would be competent, along with the evidence of the indications themselves, to admit opinions upon them.—*Ibid.*
23. The opinions, however, in such case should be confined simply to the very facts which came under the witness' own observation, and the questions put to elicit such opinions should be framed with that view, and be calculated to exclude the influence of every thing else upon the reply.—*Ibid.*
24. The testimony of a witness that two men voted who were not registered voters, that he saw their ballots as they were handed by the voters to the inspector and that he is *confident* they were straight democratic tickets, is not within the ruling in *16 Mich., 312*, as to testifying from the appearance of a folded ticket, where it does not appear that was his only source of information.—*Harbaugh v. Cicott, 241.*
25. The statute which in controversies with the representatives of deceased persons precludes evidence of matters equally within the knowledge of the deceased, does not apply to controversies with third persons acting in their own right as purchasers during the life of the deceased, and not taking by any *post mortem* estate.—*Twiss v. George, 253.*
26. In case of a bill by a wife to avoid a mortgage made on the homestead of her husband during the family occupation of it, on the ground that she never knowingly signed or acknowledged it, all presumptions, in case of conflict of testimony, must be treated with reasonable respect to the improbability of misconduct in a reputable officer, or of forgery which he ought to have discovered if it existed; and the burden of proof is on complainant to make out a plain case.—*Hourtienne v. Schnoor, 274.*
27. In an action against the wife alone, evidence of statements or acts by her husband in other cases, not shown to have been made or done in her presence or with her knowledge, is entirely incompetent.—*Campbell v. Quackenbush, 287.*
28. Evidence in an action upon a promissory note, that the only note of the kind that defendant ever signed was payable in

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two years, while the note sued upon and produced in court was payable in four months, is evidence fairly tending, if believed, to prove an alteration of the identical instrument originally signed; and it will entitle the defendant to have the case submitted to the jury on that theory.—*Jourden v. Boyce, 302.*

29. It cannot be assumed that the question whether an instrument has been altered is one that can always be determined by inspection; but it is a question of fact to be submitted to the jury in the light of all the evidence on the subject. —*Ibid.*

30. It is not error for the court to interrupt a witness who is proceeding, after objection by counsel on the other side, to testify to advice of counsel, which so far as the record shows appeared to be mere hearsay.—*Kenyon v. Woodruff, 310.*

31. In an action to charge two defendants as partners with the payment of plaintiff's services in running a shingle mill previously owned by both as a firm, but then belonging to one only, reports of a scaler employed by plaintiff, wherein the mill is described by the name of the one defendant alone, and which were made for the purpose of enabling the plaintiff to settle with the boom company for boom charges, are held admissible in evidence as tending somewhat to show notice to plaintiff that the mill business was being carried on on such defendant's individual account, and not, as formerly, by the firm.—*Robinson v. Worden, 316.*

32. The general rule in regard to proof of documents is, that the original shall be produced unless required to remain in some public office; and no record of an instrument belonging in private hands can be given in proof as primary evidence except by virtue of statutory provisions; and the reception as such evidence, in the absence of any statute authorizing it, of a certified copy of a record in the office of the secretary of state, of a state patent, is error.—*Bradley v. Silsbee, 328.*

33. The rejection of questions calling only for the witness' inferences from the facts he has testified to, is not error where no facts upon which an opinion could be based are excluded, and where the inference sought to be raised is one the jury could as well draw as the witness.—*Whittemore v. Weiss, 348.*

34. It is competent to show that a word has acquired a peculiar meaning in a certain business, as for instance, "agent" in the piano trade, and to construe it accordingly when it is made use of in reference to that business.—*Ibid.*

35. A letter of the plaintiff stating that he had sold the Knabe pianos "for the best" is held not to warrant a construction

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which would make of it an admission that he had sold them as superior to the Steinway pianos; things may be "best" in the sense of ranking in the very first class without being superior to each other, and one piano may be best for one purpose, and another for another.—*Ibid.*

36. Evidence given in explanation of delay on the part of the prosecutrix in making complaints, that she, being a young girl, and living in defendant's family, was afraid to go away for fear he would bring her back and treat her worse than ever, and that he threatened to kill her if she exposed him, is not open to the objection that it tends only to show the fear of a future possible or threatened danger, and not one presently impending.—*Turner v. People, 363.*
37. Delay in making complaint is not a fact belonging to the *res gestæ*, but is only material as bearing upon the credibility of the prosecutrix; and the credibility of her testimony, like that of other witnesses, is a matter for the consideration only of the jury.—*Ibid.*
38. One at whose instance the issue has been confined to a single question cannot complain if the same rule of evidence which he has caused to be applied to his adversary is by the court afterwards applied to him likewise.—*Albrecht v. Gies, 389.*
39. Where the defense is made to a suit upon a promissory note, that it was given in compromise of a criminal complaint against the maker's son-in-law, and was procured through the entreaties of the daughter, whose fears had been played upon by the plaintiff with that purpose, it is competent to show what she stated to her father to induce him to give the note, as this was a part of the *res gestæ*.—*Snyder v. Willey, 483.*
40. An objection to the inquiry put to defendant as a witness by his own counsel, as to what, if any thing, induced him to sign the note in suit, no ground of objection being given, is held not well taken, the inquiry being under the circumstances of no importance.—*Ibid.*
41. The exclusion of evidence in relation to previous dealings between plaintiff and defendant's son-in-law, not connected with the transactions out of which the consideration for the note in suit was claimed on the one side to have grown, nor with the criminal prosecution, to compromise which the other side asserted the note was given, is held not to be error.—*Ibid.*
42. The exclusion of the inquiry, put to the plaintiff as a witness by his own counsel, whether the settlement in which he received the note in suit, was made with a view on his part of compounding any felony or settling any criminal offense,

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or only for the purpose of securing his just debt, is held, under the circumstances of this case, all the surrounding facts having been proved, not to be error.—*Ibid.*

43. Defenses to an action of assumpsit, going to the existence of any promise having legal force, are admissible under the general issue.—*Ibid.*

44. The silence of an employé when his employer stated to a fellow employé in his presence that the former was to have a dollar a day, and the latter should have the same, ought not to be treated as an admission of the truth of such statement, in his suit for wages; at least not in the absence of any showing that he in fact heard it, or that it was made in such a way as to call upon him to deny it if untrue; and the rejection of evidence of such statement is not error.—*Barry v. Davis, 515.*

45. The exclusion of parts of conversations between the parties, which are connected in sense with other parts thereof which were admitted and are pertinent to the subject matter in controversy, is held error.—*Ibid.*

See ACCOUNT STATED, 1-3: AGENCY, 1: ARBITRATION, 3: ASSAULT AND BATTERY, 1-3: BUILDING CONTRACTS, 2, 5, 7: CHARGE TO THE JURY, 2, 4: CONTRACTS, 13: CROSS-EXAMINATION: DECLARATION, 1, 2: EJECTMENT, 1, 2: EMPLOYMENT: EQUITY PLEADING AND PRACTICE, 1, 2, 16: ESTATES OF DECEASED PERSONS, 2: FALSE IMPRISONMENT, 2-6: FINDING OF FACTS, 1: FRAUD, 2, 9: FRAUDULENT TRANSFERS, 2: GARNISHEE PROCEEDINGS, 3: GUARANTY, 8: INFORMATIONS, 2, 3: INSURANCE, 7: JUDGMENT, 3, 4: LIBEL, 1-6: LOG-LIEN LAW, 5: MISTAKE: PRACTICE IN SUPREME COURT, 9, 11, 12: PRELIMINARY EXAMINATIONS, 2: PROMISSORY NOTES, 2, 3: RAILROADS, 6, 7, 11: RECITALS, 1, 2: REPLEVIN, 5: SALES OF GOODS, 6: SEDUCTION, 1-11: SPECIFIC PERFORMANCE, 5, 6, 8: VOLUNTARY SUBSCRIPTIONS, 7.

EXAMINATIONS.

See CRIMINAL COMPLAINTS, 1-3: PRELIMINARY EXAMINATIONS. 1-2.

EXAMINING MAGISTRATE.

See PRELIMINARY EXAMINATIONS, 1, 2.

EXCEPTIONAL METHODS.

See SERVICE OF PROCESS, 4.

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EXCEPTIONS.

A charge to the jury to which no exception was taken will not be considered on error.—*Roberts v. Fitzgerald*, 4.

See ASSIGNMENTS OF ERROR, 2: BILLS OF EXCEPTIONS: EVIDENCE, 19: PRACTICE IN SUPREME COURT, 6.

EXCUSE FOR DELAY.

See SPECIFIC PERFORMANCE, 4, 7.

EXECUTION.

See EVIDENCE, 1, 12, 13: PRACTICE IN CIRCUIT COURTS, 5: PROMISSORY NOTES, 5, 6.

EXECUTION LEVY.

1. A levy upon the interest in lands of an owner who was under contract to convey upon future payments, would take the legal title in full and a beneficiary interest subject to the liability of conveying on complete performance by the vendee.—*Doak v. Runyan*, 75.
2. A levy made after the return day of the writ, or after the expiration of the official term of the officer, will render a sale thereunder void; but where the officer, before the return day and during his official term, has commenced the execution of the writ, he may, even without the aid of statutory provisions, complete it afterwards, though his term have in the meantime expired; the statutes in this regard are but declaratory of the common law.—Per MARSTON, J., COOLEY, CH. J., concurring.—*Blair v. Compton*, 414.
3. The statutory requirements regulating proceedings upon execution are duties which the ministerial officer of the court executing its process is required to perform; and all reasonable presumptions are to be indulged in favor of the regularity of the acts of the officer.—Per MARSTON, J., COOLEY, CH. J., concurring.—*Ibid.*
4. Under the statute (*Comp. L.*, § *6113*) providing means for taking and selling on execution the shares or interests of a stockholder in a corporation, the right to serve the copy as therein provided upon "any officer or person who has at the time the custody of the books and papers of the corporation," is not to be confined alone to the case where there is no such officer of the company as "clerk, treasurer, or cashier;" but where the sheriff of the proper county where the office of the company within this state for the transaction of busi-

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ness is located, certifies that there is no clerk, treasurer or cashier within his bailiwick, he may then lawfully serve a copy upon any officer or person who has at the time the custody of the books and papers of the corporation.—Per MARSTON, J., COOLEY, CH. J., concurring.—*Ibid.*

5. A return of service of such copy upon "Wm. M. Smith, in charge of the office of the company," sufficiently indicates that such office was within the bailiwick of the officer certifying to such service, as it will not be presumed that the sheriff went outside his county to make service.—Per MARSTON, J., COOLEY, CH. J., concurring.—*Ibid.*

6. A certificate of service "upon the following persons, who I was informed had the custody of the books and papers of the said company, William H. Boyd, deputy secretary or clerk of said company, William M. Smith, in charge of the office of the company, and Benjamin S. Compton, president of the company," is held to be a sufficient return of service upon "the officer or person who had at the time the custody of the books and papers."—Per MARSTON, J., COOLEY, CH. J., concurring.—*Ibid.*

7. However it may have been at common law, under our statutes the levy of an execution need not be complete or perfect on or before the return day, in order to entitle the officer to proceed afterwards, but where an officer has in good faith begun the service by an attempt to levy upon property, that is sufficient.—Per MARSTON, J., COOLEY, CH. J., concurring.—*Ibid.*

8. Under our statutory regulations governing stay of execution by bail in error, the stay does not dissolve or vitiate a completed levy on personalty under an outstanding execution, and it is lawful for the sheriff, unless otherwise directed by the court, to proceed and sell property which had previously been completely subjected to levy, and return the proceeds into court.—Per GRAVES, J.—*Ibid.*

9. But where the stay became operative before levy on any thing was consummated, or any thing done beyond a mere movement towards a levy, or an ineffectual attempt to levy these preliminary steps do not constitute a proceeding capable of independent existence as a legal fact as a beginning of execution, such as to survive the stay, and after its cessation to be pieced out by further proceedings to a valid levy relating back to the original action.—Per GRAVES, J.—*Ibid.*

10. The mere preliminary service, in accordance with the statute (*Comp. L. 1871, §§ 6112-3*) governing levies upon shares of stock, of a copy of the execution upon persons in charge of the company books and papers, is not sufficient to make out either a consummated levy or the beginning of execution of

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the process, such as would survive the stay of bail in error or contribute any force to further proceedings taken after the stay had ceased.—Per GRAVES, J.—*Ibid.*

See DEEDS OF GIFT, 1, 2: EQUITY JURISPRUDENCE, 4–6, 9, 10: EVIDENCE, 13: EXECUTION SALES, 1–14: FRAUDULENT TRANSFERS, 2: TROVER, 3.

EXECUTIONS.

See EXECUTION LEVY, 1–10: EXECUTION SALES, 1–14: EXEMPTIONS, 1, 2.

EXECUTION SALES.

1. The circuit courts have authority, as between the parties to a cause pending therein, to set aside upon motion for any illegality appearing therein a levy or sale by virtue of an execution issued by such court; and in case of an excessive levy or of a sale for an inadequate price, they may upon motion set aside the levy or sale; and the facts, if not appearing on the face of the papers, may properly be shown by affidavit. Every court controls its own process, and will prevent an abuse of the same, if its attention is seasonably called thereto upon motion.—Per MARSTON, J., COOLEY, CH. J., concurring.—*Blair v. Compton, 414.*
2. The purchaser at a judicial sale must be considered as having submitted himself thereby to the jurisdiction of the court as to all matters connected therewith; and when he has notice of a motion to set aside the sale, and in answer thereto appears, and without objection goes to a hearing on the merits, he is not in a position to afterwards object to the power of the court to decide such motion.—Per MARSTON, J., COOLEY, CH. J., concurring.—*Ibid.*
3. Corporate shares were not at common law subject to levy and sale under execution, and statutes authorizing it must be substantially complied with, or the sale will be unauthorized and void.—Per MARSTON, J., COOLEY, CH. J., concurring. —*Ibid.*
4. A compliance with the provisions of the statute (§ *6114*), as to ascertaining from the officer appointed by the corporation to keep the record thereof, the number of shares subjected to the levy by the service of the required notice, is not absolutely necessary to a valid execution sale, provided the sheriff ascertains from any source the actual number of shares owned by the judgment debtor, and puts them up and makes sale thereof.—Per MARSTON, J., COOLEY, CH. J., concurring.—*Ibid.*
5. An execution sale, under a notice describing the property as all the stock of a named corporation standing in the defend-

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ant's name on the books of the company or legally or equitably owned by him on specified days, the precise number of shares being unknown, but estimated to be 11,000 shares, where the amount at the sale was represented to be at least 4,162 shares, is sustained as against the objections of the judgment debtor, the purchaser making no complaint, as a valid sale to the extent of the 4,162 shares, but is held void as to the excess.—Per MARSTON, J., COOLEY, CH. J., concurring.—*Ibid.*

6. The rules applicable to the sales of personal property on execution do not apply to sales, under the statute, of shares in a corporation; and a sale in bulk of the defendant's entire interest is not void, though it might in a proper case on motion be set aside.—Per MARSTON, J., COOLEY, CH. J., concurring.—*Ibid.*
7. To authorize the setting aside of an execution sale of stocks on the ground of inadequacy of price in consequence of the sale being in bulk of the defendant's whole interest, a very clear case should be made out; a creditor ought not to be delayed in the collection of his debt until the property of his debtor will sell for the price his neighbors may fix upon it, or until it can be sold for as much as might be obtained at private sale under favorable circumstances.—Per MARSTON, J., COOLEY, CH. J., concurring.—*Ibid.*
8. A sale of personal property upon execution is not valid, either at common law or under our practice, unless the property is produced at the place of sale and within the view of the bidders, in the actual control of the officer, and present for identification and delivery.—Per CAMPBELL, J.—*Ibid.*
9. The statutory regulations as to levying upon and selling stock under executions must be read and applied in the light of the rules of corporate law.—Per CAMPBELL, J.—*Ibid.*
10. The corporate interests which under the statute can be levied on and sold under execution are only such legal interests as appear on the corporation records as shares belonging to the judgment debtor; and no levy can cover either interests subsequently acquired or mere equitable interests.—Per CAMPBELL, J.—*Ibid.*
11. While a levy served according to the statute may bind the property, yet before a lawful sale can be made the stock must be in some way obtained and identified and in shape for delivery; the difficulty of finding property will not justify a sale of it at random and out of sight.—PER CAMPBELL, J.—*Ibid.*
12. Execution sales of stock should be in amounts within the reach of ordinary purchasers; and a sale under a notice advertising all stock standing in the debtor's name, "or

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legally or equitably owned by him" on two specified dates, the precise amount being unknown but estimated at 11,000 shares of the nominal value of fifty dollars a share, cannot be sustained.—Per CAMPBELL, J.—*Ibid.*

13. The fact that at the sale under such a notice it was represented that the amount was at least 4,162 shares, without identifying them or stating the title to be a legal title,—the notice not so averring it,—does not cure the defects.—Per CAMPBELL, J.—*Ibid.*

14. Nor is it enough that the actual purchaser is satisfied; the debtor has a right to have a chance for fair competition, and bidders have a right to expect the sheriff to be furnished with some evidence which binds the company by a statement of the amount of stock and ensures them the enjoyment of what they bid upon.—Per CAMPBELL, J.—*Ibid.*

See EXECUTION LEVY, 1-10: PRACTICE IN CIRCUIT COURTS, 8-10.

EXECUTORS.

See ESTATES OF DECEASED PERSONS, 1.

EXECUTORY CONTRACTS.

See SALES OF GOODS, 1-4.

EXEMPLARY DAMAGES.

1. An intentional assault, whether serious or trivial, must be regarded as willful, and would authorize such damages as in the sound judgment of the jury the character and extent of its atrocity would require; and where the evidence tends to show an indecent, if not a felonious assault, the case is a fit one for exemplary damages.—*Elliott v. Van Buren, 49.*

2. The question of the propriety of exemplary damages in cases of willful wrong is no longer an open one in this state.—*Ibid.*

See FALSE IMPRISONMENT, 3, 6: TROVER, 1.

EXEMPTIONS.

1. A transferee of a note given for the purchase price of the property is not entitled to claim that as to his judgment on such note the property, though otherwise exempt, is liable to execution by virtue of the exception in favor of purchase price claims. It is not admissible for the purpose of bringing a case within this exception to trace the original consideration through successive changes and substitutions.—*Shepard v. Cross, 96.*

2. Exemptions from execution being intended for the benefit of

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the family, a joint replevin suit by husband and wife to preserve this benefit is admissible under our statute, which expressly confers upon the wife the right to sue alone, and does not forbid a joint suit.—*Ibid.*

EXISTENCE OF HIGHWAY.

See HIGHWAYS, 3.

EXPENSES.

See TAXATION, 6.

EXPERTS.

See EVIDENCE, 21-23: SEDUCTION, 11.

EXTENSION.

Of redemption: See SPECIFIC PERFORMANCE, 9, 10.
See CHATTEL MORTGAGES: SWAMP LANDS, 2-4: TAXATION, 4.

EXTORTION.

See EVIDENCE, 39-42.

EXTRAORDINARY CIRCUMSTANCES.

See ADJOINING PROPRIETORS, 5: RAILROADS, 1-3.

FACTS FOUND.

See PRACTICE IN SUPREME COURT, 3.

FAILURE TO ANSWER.

See SPECIAL QUESTIONS TO JURY, 10.

FAILURE TO DENY.

See EVIDENCE, 44: LOG-LIEN LAW, 4.

FALSE IMPRISONMENT.

1. It is just as competent for a magistrate, as conservator of the peace, to order into custody an insane man who is committing a breach of the peace in his presence, as to order the arrest of a sane person under like circumstances; though an insane person may not be guilty of crime, he may lawfully be prevented from doing harm.—*Lott v. Sweet, 308.*
2. In an action for false imprisonment, where the plaintiff has introduced evidence to show that defendant caused the arrest

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complained of at the instance of a third person to get plaintiff out of the way so that he could not testify as a witness in a suit then pending, defendant may give evidence as to conversations with such third person as to the arrest, tending to show that he was not induced to make the arrest for any such purpose.—*Livingston v. Burroughs*, 511.

3. Where exemplary damages are claimed and are admissible it becomes a material question whether the defendant acted prudently, wisely, or in good faith, and for this purpose the information on which he acted, whether true or false, is original and material evidence.—*Ibid.*
4. The information which, if believed, will justify making a criminal complaint, must be of such character and obtained from such sources that business men generally, of ordinary care, prudence and discretion, would act upon it under similar circumstances; and whether the facts of a case bring it within this rule, is a question for the jury.—*Ibid.*
5. The advice of one not an attorney, but who sometimes advises his neighbors for pay, is not admissible in evidence as advice of counsel in an action for false imprisonment.—*Ibid.*
6. In an action for false imprisonment, in procuring plaintiff's arrest upon a criminal complaint and warrant which charged no offense known to the law, the question whether the defendant had reasonable or probable cause for making the complaint is wholly immaterial, except as it affects the recovery of exemplary damages; his good faith could not prevent the recovery of the actual damages plaintiff suffered.—*Ibid.*

See JUDGMENT, 2.

FALSE PUBLICATION.

See LIBEL, 4, 5.

FALSE REPRESENTATIONS.

See PROMISSORY NOTES, 2, 3.

FALSE SWEARING.

See SLANDER.

FEAR.

See CHARGE TO THE JURY, 6: EVIDENCE, 36.

FELONIOUS DESIGN.

See ASSAULT AND BATTERY, 2.

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FIDUCIARY RELATIONS.

See FRAUD, 1, 6, 8–11.

FILING BILL.

See EQUITY PLEADING AND PRACTICE, 8.

FINAL HEARING.

See EQUITY PLEADING AND PRACTICE, 4.

FINAL ORDER.

See EQUITY PLEADING AND PRACTICE, 6, 10.

FINDING OF FACTS.

1. In an action by a bank to recover the amount of a check drawn upon it by the defendant, and paid by the bank though defendant had no funds on deposit, the claim put forward by defendant that the check grew out of an intended horse trade which was not consummated, and that the bank was notified not to pay it, is fully met and disposed of by the finding of the jury that the check was to be paid even if the horse trade fell through, and that the payment was made before notice not to pay was received.—*Frankenberg v. First National Bank of Decatur*, *46*.
2. Where the finding of facts in a suit against two defendants fails to show any joint undertaking or liability of both, but rather shows a separate liability of one defendant only, it will not support a judgment against both defendants.—*Ives v. O'Brien*, *175*.

See PRACTICE IN SUPREME COURT, 3.

FINE OR IMPRISONMENT.

See JUDGMENT, 1, 2.

FIRE LIMITS.

See EQUITY JURISPRUDENCE, 1–3.

FORECLOSURES.

1. Mortgagees holding several mortgage notes falling due at different dates and secured by the same mortgage, who have foreclosed by advertisement when only a part of the notes were due, under a notice of a sale to be made subject to another note specified, and have themselves become purchasers, received a deed and had the same recorded, cannot, after de-

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fault in redemption, maintain an action against the mortgagor upon the note subject to which the foreclosure sale was made.—*Shermer v. Merrill, 284.*

2. Mortgagees who become purchasers at a foreclosure sale stand in no better position than a third party who becomes such purchaser; and if a third party purchase subject to another note which is a charge upon the land, the mortgagor, if compelled to pay such note to the mortgagee, would be entitled to be subrogated to the rights of the mortgagee under the mortgage, in order to subject the land charged with the payment of the debt.—*Ibid.*
3. The purchaser at an irregular foreclosure sale obtains all the rights of the mortgagee, including, in case the mortgage was made prior to 1843, the right of possession.—*Hoffman v. Harrington, 392.*
4. The statutory provisions for foreclosure are to be treated as a part of every mortgage with a power of sale executed under the statute; and the sale under the power is a distinct exercise of authority under the terms of the contract; and while it may not be effectual to bar redemption unless in accordance with the statute, it conveys the title of the mortgagee, and that of the mortgagor subject to his redemption right.—*Ibid.*
5. The officer who conducts a statutory foreclosure sale merely stands in the shoes of the mortgagee, and represents both parties; and under the statute of 1833 the power of sale continued in force as a personal power, until completed by deed, in the person who acted when the property was struck off, passing in case of his death to his representatives, and not to any official successor; and where the sale was made by the sheriff he might at the proper time lawfully execute the deed, though his term of office had in the meantime expired. —*Ibid.*

See CHANCERY SALES, 1–5: DEEDS, 2–5: EQUITY PLEADING AND PRACTICE, 6–8, 15, 17, 18: RES ADJUDICATA, 1, 2: SPECIFIC PERFORMANCE, 9, 10.

FOREIGN CORPORATIONS.

See GARNISHEE PROCEEDINGS, 1, 2: SERVICE OF PROCESS, 3, 4.

FOREIGN COUNTY.

See SERVICE OF PROCESS, 1, 2.

FOREIGN LAWS.

See CONTRACTS, 5, 6.

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FOREIGN SERVICE.

See SUPERIOR COURT OF GRAND RAPIDS, 3, 4.

FORFEITURES.

See INSURANCE, 3: REMEDY: REPLEVIN, 4.

FORGERY.

See EVIDENCE, 26.

FORM.

See JUDGMENT, 1, 5.

FORMAL DEFECTS.

See AMENDMENTS: JUDGMENT, 5: TAXATION, 12.

FRAUD.

1. Intentional concealment between persons in confidential relations is legal fraud.—*Beam v. Macomber, 127.*
2. Where one who as deputy sheriff has taken property at the request of one falsely claiming to be owner, and removed and delivered it to one asserted by the latter to have a valid chattel mortgage upon it, and been mulcted in damages therefor by the real owner, brings his action for the fraudulent misrepresentations, evidence that shortly after the removal of the property the pretended mortgagee stated to the plaintiff it had been stolen from him, and he guessed it was on its way to Kansas, while in fact it was shortly thereafter in public use at the village where defendants both resided, is held admissible as tending somewhat to show a concert of action between defendants in running off and concealing the property.—*Kenyon v. Woodruff, 310.*
3. Designed partial statements which deceive, and concealment of facts such as to make those declared partial and misleading, are fraudulent in law.—*Ibid.*
4. The relation of principal and surety grows out of the consent of all the parties; and the principles belonging to it, in respect to the right of recovery over, can have no necessary application to a case where one without intentional wrong on his part has been induced by the fraud of another to do an act for which he has been held accountable as for a wrong committed against a third party.—*Ibid.*
5. Where parties by fraud have induced another innocently to convert the property of a third for their benefit, and have undertaken his defense of a trover suit brought by the latter,

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and have failed, and execution has been levied on his property sufficient to satisfy the judgment, the measure of damages in his action against them for the fraud, is the amount of the judgment against him, with interest, though he has not in fact paid such judgment.—*Ibid.*

6. Where a husband, after soliciting and obtaining the consent of his wife to the mortgaging of her property to secure the purchase price of goods then presently to be sold and delivered to him, presented to her, though without any false representations, and procured her to execute a mortgage covering also an old indebtedness of his, of which she was not informed, in addition to such purchase price, the mortgage was held void as to the prior indebtedness for the fraud, but valid as to the residue thereof.—*Smith v. Osborn, 410.*
7. One who has innocently received from a husband, to secure the purchase price of goods then presently sold and delivered to him, and also a prior indebtedness of his, a mortgage executed by his wife upon her own property, which as to such prior indebtedness was a fraud upon her, cannot claim to have equities superior to hers so long as the avoiding of the mortgage to the extent of such old indebtedness will not place him in any worse position than he originally occupied. —*Ibid.*
8. A wife being desirous of devising her property so that her husband should have the benefit of it but his creditors should not deprive him of her bounty, and having consulted an attorney in the matter, and at his suggestion having devised the property in absolute terms to the attorney and another, on an oral understanding that they should hold the same for her husband's use, the facts being undisputed and the attorney admitting the whole case and signifying his readiness to perform on his part, the trust was enforced in equity against the other devisee.—*Hooker v. Axford, 453.*
9. The circumstance that the husband was the medium of his wife's communications with the attorney, and that the only positive and distinct evidence of her intent to bestow the property on her husband consists of his statements at the time and of his testimony in the cause, is not an insuperable obstacle to the granting of relief, where many surrounding circumstances and facts that are undisputed corroborate, and none are in conflict with it.—*Ibid.*
10. An attorney thus advising the devise of property to himself on the pretense that he would only make use of it for another, but intending nevertheless to appropriate it to his own use, would be guilty of a gross fraud and breach of confidence; and it would be equally a fraud if, having given the advice hon-

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estly, he should afterwards conclude dishonestly to keep the property.—*Ibid.*

11. And the party who, under such attorney's advice, was associated with him as trustee, would be in like position, and it would be a fraud in him to appropriate that which only by the attorney's advice, given for another person's benefit, is brought within his reach.—*Ibid.*

See ARBITRATION, 1, 2: DEEDS, 4: DEEDS OF GIFT, 1, 2: EQUITY JURISPRUDENCE, 4–7: ESTOPPEL, 2, 3: EVIDENCE, 15, 39–42: FRAUDULENT TRANSFERS, 1, 2: HOMESTEAD: MORTGAGES, 6: PROMISSORY NOTES, 2, 3: REPLEVIN, 2: RES ADJUDICATA, 1, 2: RESULTING TRUSTS.

FRAUDULENT DELIVERY.

See MORTGAGES, 6.

FRAUDULENT TRANSFERS.

1. An agreement whereby one party is to work land for the benefit of another who is to own and have the crops raised and apply the proceeds upon an indebtedness due to him from such other party, is not a chattel mortgage, and does not require to be filed with the town clerk to preserve the rights of the parties under it.—*Haynes v. Ledyard, 319.*

2. As between one holding such a contract and the sheriff, claiming to hold the crops raised, as the property of the other party thereto, by virtue of an execution levy under a judgment rendered before the contract was made, it is competent for the sheriff to show that such contract was made to protect the property for such judgment debtor, and without any honest intent that it should have effect according to its apparent purpose; and the intent with which the instrument was made was a question of fact for the jury.—*Ibid.*

See DEEDS OF GIFT, 1, 2: EQUITY JURISPRUDENCE, 4–7: HOMESTEAD.

FREEZING.

See RAILROADS, 4, 5.

FREIGHT.

See RAILROADS, 1–6.

FREQUENT REPETITIONS.

See SEDUCTION, 4–7.

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FRUIT.

See RAILROADS, 4, 5.

FUTURE INSTALLMENTS.

See FORECLOSURES, 1, 2.

GARNISHEE PROCEEDINGS.

1. The general agent in this state of a foreign corporation doing business here, who is authorized to receive service of process on its behalf, has authority under the statute, when he has been served with garnisee process against the company, to make answer or disclosure on behalf of the company.—*Lorman v. Phœnix Ins. Co.*, *65*.
2. A foreign corporation against which garnishee process has been served upon its lawfully authorized agent, is not to be considered in default for want of an answer after disclosure filed by such agent.—*Ibid.*
3. The disclosure in garnishee proceedings is to be considered as evidence for the plaintiff, and unless it affirmatively discloses a liability to the principal defendant the plaintiff cannot recover.—*Ibid.*
4. It is essential in order to bind the creditor whose claim is sought to be appropriated by means of garnishee proceedings, that there be service of process or its equivalent, and he will not be bound by an independent and spontaneous submission of his rights by his debtor. The intervention of the law according to its own substantial appointments can alone initiate compulsory novation.—*Hebel v. Amazon Ins. Co.*, *400*.
5. And where the service must be vicarious and it can lawfully be made only on some one standing in a special relation to the party sought to be served, the existence of such special relation is just as indispensable as, in ordinary cases, is the identity of the person served, with the defendant.—*Ibid.*
6. The bringing the right into the custody of the law by the application of process against some one competent to receive service, cannot be waived by the intended garnishee as against the principal defendant, and so as to bind him.—*Ibid.*
7. Service of garnishee process from justice's courts cannot under the statute (*Comp. L. 1871*, § *6463*) be made beyond the county; and an acceptance of service which shows that it was made outside the county, thereby shows that it was made where the process had no legal force.—*Ibid.*

See PRACTICE IN CIRCUIT COURTS, 3.

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GENERAL BANKING LAW.

See GUARANTY, 6–8.

GENERAL ISSUE.

See EVIDENCE, 43: PROMISSORY NOTES, 5, 6.

GENERAL OBJECTION.

See PRACTICE IN SUPREME COURT, 9.

GENERAL VERDICT.

See SPECIAL QUESTIONS TO JURY, 2–10.

GOOD FAITH.

See ARBITRATION, 2: FALSE IMPRISONMENT, 3, 6: LIBEL, 5: TROVER, 1.

GOOD NEIGHBORHOOD.

See ADJOINING PROPRIETORS, 4.

GOODS SOLD AND DELIVERED.

See CONTRACTS, 3–6: SALES OF GOODS, 1–6.

GRANTEE.

See DEEDS, 1–5.

GROUND OF DECISION.

See PRACTICE IN CIRCUIT COURTS, 10.

GUARANTY.

1. Contracts of guaranty are to be construed like other contracts, and the intent of the parties, as collected from the whole instrument, and the subject matter to which it applies, is to govern.—*Locke v. McVean*, 473.
2. But when an understanding is once reached of the true agreement, the rules and principles which pertain to the rights and duties of principal and surety apply, so far as appropriate to the form of that relation recognized in the case of guarantor and guarantee, or admissible in view of the nature and terms of the particular transaction.—*Ibid.*
3. A bond given to secure the performance of a written contract is to be construed as if the contract were copied into the preambles of the condition of the bond.—*Ibid.*

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4. One who has become guarantor for such notes of a specified description as another should give in pursuance of a written contract, cannot by virtue thereof be held liable for notes differing materially from those for which the contract provided.—*Ibid.*
5. Where the contract, the performance of which is guarantied, provides for notes at four months without interest, to be renewed, if desired, for sixty days, at eight per cent., the guarantor is not holden for notes running six months, with interest for four months at seven per cent., and thereafter at eight, nor for six months' notes with interest at eight per cent. after four months; the variance is a substantial one, as affecting the rights of a surety.—*Ibid.*
6. A guaranty against loss or liability for signing as sureties, given by a bank president in his own name and without authority from the directors, to those whom he had solicited thus to sign a note given to the bank to retire a prior note held by it against their principal, is held to be the individual contract of the president, and not binding upon the bank.—*First National Bank of Sturgis v. Bennett*, 520.
7. Such a guaranty, if made by the bank and binding upon it, would be a bar to any suit by the bank against the sureties; and it is doubtful whether under the general banking law a national bank could give such a guaranty in a case where the effect would be to make the paper discounted the paper of one party only, secured by mortgage on real estate.—*Ibid.*
8. A guaranty to sureties against loss or liability is within the statute of frauds as an undertaking to answer for the debt or default of another; and when made in writing in the name of one party and purporting on its face to bind no other, can no more be shown by parol to be in fact the undertaking of a different party, than could such a liability be originally created by parol.—*Ibid.*

See EVIDENCE, 20.

HEARING AT CHAMBERS.

See PRACTICE IN CIRCUIT COURTS, 7.

HEARSAY.

See EVIDENCE, 17, 27, 30.

HIGHWAYS.

1. In action to recover damages suffered from an unlawful obstruction of a highway, no recovery can be had by reason of a third person passing over plaintiff's land to get around the obstruction, in the absence of a special allegation of such

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damage or of the averment of facts and circumstances from which such a consequence would naturally result.—*Roberts v. Fitzgerald*, 4.

2. One cannot recover for being compelled by highway obstructions to travel several miles around by another highway, where such obstructions are partly of her own erection, and where but for her part therein there would be ample room for passage.—*Ibid.*

3. In proceedings under the statute to remove encroachments and obstructions to highways, it is not competent to make trial of the question of the existence of the asserted highway; if its existence is seriously questioned, that must be settled in some other way.—*Campau v. Button*, 525.

See CERTIORARI, 2: EJECTMENT, 3, 4.

HIRING.

See ESTATES OF DECEASED PERSONS, 2.

HOLDER FOR COLLECTION.

See PROMISSORY NOTES, 7.

HOLDING SALE OPEN.

See CHANCERY SALES, 1.

HOMESTEAD.

The conveyance by a debtor of land which is exempt as a homestead from any coercive proceedings by his creditors, cannot operate to defraud his creditors, and is not within the statutory regulation which makes a debtor's disposal of property with intent to defraud creditors voidable at the instance of the creditors. *Herschfeldt v. George*, 6 *Mich.*, 456, is modified and limited.—*Smith v. Rumsey*, 183.

See EQUITY JURISPRUDENCE, 7: EVIDENCE, 26.

HORSES.

See REPLEVIN, 7, 8: TAXATION, 6.

HUSBAND AND WIFE.

See DEEDS OF GIFT, 1, 2: DIVORCE: EVIDENCE, 27: EXEMPTIONS, 2: FRAUD, 6–11: REPLEVIN, 7, 8.

IDENTIFICATION.

See EVIDENCE, 12: EXECUTION SALES, 8, 11: INFORMATIONS, 2.

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IDENTITY.

See EVIDENCE, 20.

ILLEGALITY.

See CONTRACTS, 5, 6, 12: EVIDENCE, 39–42: PROMISSORY NOTES, 8, 9: TAXATION, 5, 7.

ILLEGAL SEIZURES.

See TAXATION, 12.

ILLEGAL TAX.

See TAXATION, 9, 10, 12.

ILLEGAL VOTES.

See ELECTIONS, 1, 2: REMOVAL OF COUNTY SEAT, 4: SPECIAL QUESTIONS TO JURY, 4, 6–10.

ILLICIT INTERCOURSE.

See SEDUCTION, 3–6.

IMMATERIAL INQUIRIES.

See EVIDENCE, 9, 40, 41.

IMMATERIAL RULINGS.

See PRACTICE IN SUPREME COURT, 12.

IMPLEMENTS.

See MASTER AND SERVANT, 2–4.

IMPLIED CONDITIONS.

See VOLUNTARY SUBSCRIPTIONS, 1.

IMPLIED PROMISES.

See BUILDING CONTRACTS, 1, 2.

IMPOSSIBILITIES.

See NEGLIGENCE, 1, 2.

IMPRISONMENT.

See FALSE IMPRISONMENT, 1–6: SUSPENDED SENTENCE: VERDICT.

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IMPROPER PURPOSES.

See LIBEL, 5.

INADEQUACY OF PRICE.

See EXECUTION SALES, 7.

INCOMPLETE INSTRUMENT.

See SALES OF GOODS, 5, 6.

INCONCLUSIVE INQUIRIES.

See SPECIAL QUESTIONS TO JURY, 8.

INCORPORATION.

See EVIDENCE, 2.

INDEFINITENESS.

See EQUITY JURISPRUDENCE, 11: EXECUTION SALES, 5, 12–14: RECOUPMENT.

INDICTED FOR FALSE SWEARING.

See SLANDER.

INDIVIDUAL CONTRACTS.

See DECLARATION, 2: GUARANTY, 6–8.

INDIVIDUAL LIABILITY.

See CORPORATIONS, 3–8.

INDIVISIBLE TRANSACTIONS.

See SALES OF GOODS, 6.

INFERENCES.

From facts: See EVIDENCE, 33.

INFORMATION.

See EXECUTION LEVY, 6: FALSE IMPRISONMENT, 4, 5.

INFORMATIONS.

1. It is not competent to charge in an information an offense for which no preliminary examination has been had or waived;

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and to determine whether such an examination was had as to any specific offense charged in the information, recourse can be had only to the examinations returned and filed by the magistrate.—*Turner v. People*, *363*.

2. Where the depositions taken on the preliminary examination specify and identify by a number of coincident facts and circumstances a particular offense which the complainant states she thinks was in May, 1874, this will justify an information charging the offense as of May 5, 1874, and a conviction based upon evidence tending to prove the identical offense thus identified and singled out.—*Ibid.*

3. Time is not an ingredient of a criminal offense in any such sense as to make it necessary to charge it precisely according to the truth; but the information or indictment may state one time and the proof show a different one, without involving an objectionable variance.—*Ibid.*

See PRELIMINARY EXAMINATIONS, 1: WAIVER.

INJUNCTION.

See EQUITY JURISPRUDENCE, 1-3, 11.

INJURIES.

To buildings: See ADJOINING PROPRIETORS, 1-6.
To business: See LIBEL, 1, 3, 7.
See EVIDENCE, 6.

INNOCENT PARTIES.

See FRAUD, 7.

INSANE PERSON.

See FALSE IMPRISONMENT, 1.

INSPECTION.

See EVIDENCE, 29.

INSPECTORS.

See ELECTIONS, 2.

INSTALLMENTS.

See EQUITY PLEADING AND PRACTICE, 15: FORECLOSURES, 12.

IN STATU QUO.

See FRAUD, 7.

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INSTRUCTIONS.

See CHARGE TO THE JURY.

INSURANCE.

1. In a contest as to the adjustment of the proportion of a loss by fire, under a policy providing for averaging the loss, which one of several insurers of a firm should bear, a policy in another company, taken in the individual name of one of the partners prior to the formation of the partnership, and never assigned to the firm, though by the terms of the partnership agreement all insurance was to be, but which was shown to have been treated and dealt with, both by said firm and by the company issuing it, as a subsisting policy in full force in favor of the firm, is held to be entitled to be drawn into the adjustment and to be chargeable with its proportion of the loss, and to that extent to reduce the amount recoverable upon the policy in suit.—*Liverpool, London & Globe Ins. Co. v. Verdier, 138.*

2. Where an insurance policy which contains a proviso that additional insurance procured without the consent of the company endorsed thereon should annul the policy, also contains the clause: "$3,000 other insurance permitted," it furnishes its own rule of construction as to the definiteness meant to be required in the consent to future insurance.—*Westchester Fire Ins. Co. v. Earle, 143.*

3. All those conditions and provisions in insurance policies which involve forfeitures are to be construed strictly.—*Ibid.*

4. Except where prevented by the operation of the statute of frauds, or some other equivalent prohibition, a policy of insurance may be made or changed by parol; and the fact that a policy is written, does not prevent its change by subsequent parol agreement, or its enlargement or continuance.—*Ibid.*

5. Notwithstanding an insurance policy contains a proviso against additional insurance except upon "the consent of this company written hereon," and provides also that "the use of general terms, or any thing less than a distinct specific agreement, clearly expressed and endorsed upon this policy, shall not be construed as a waiver of any printed or written condition or restriction therein," yet where an agent with whom all the dealings were had, and whose authority is not shown to have been restricted in any way, has so acted as to have bound himself by way of estoppel not to dispute the validity of certain additional insurance on the point of consent, the company will be likewise bound.—*Ibid.*

6. Where an agent having authority to consent on behalf of the company to additional insurance, and with whom the origi-

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nal dealing was had, has first negotiated to get further insurance placed in some company which he represented, and conveyed the impression that consent thereto in writing was not necessary, and afterwards, when informed of the procuring of an additional policy elsewhere, has made no objection, then or at any other time, nor offered any suggestion that any breach of condition of the original policy had been created or would be relied upon, this would make out a plain case of estoppel as to the agent, and would also preclude the company from setting up such condition in avoidance of their policy.—*Ibid.*

7. Evidence concerning the purchase of the additional machinery, which was the occasion for the new insurance, is held to have been admissible as part of the *res gestæ*.—*Ibid.*

See CONTRACTS, 2.

INTENDMENTS.

See BUILDING CONTRACTS, 2.

INTENTION.

See CONTRACTS, 6: ELECTIONS, 4: FRAUDULENT TRANSFERS, 2: GUARANTY, 1, 2: VERDICT.

INTENTIONAL ASSAULT.

See EXEMPLARY DAMAGES, 1, 2.

INTENTIONAL CONCEALMENT.

See FRAUD, 1.

INTEREST.

1. An allowance of interest on a subscription in aid of a railroad from the date of the completion of the road, where the promise was to pay one year after its completion, and nothing is expressed about interest, is error.—*Stevens v. Corbitt*, 458.

2. An agreement to pay within one year from the happening of an uncertain event ought not to bear interest, in the absence of any express promise to pay interest, until after demand, or where no demand was made, until suit brought.—*Ibid.*

See MUNICIPAL BOARDS, 1, 2: PROMISSORY NOTES, 4: SPECIFIC PERFORMANCE, 10.

INTOXICATING LIQUORS.

See CONTRACTS, 3–6: SUNDAY LIQUOR LAW, 1–4.

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IRREGULAR FORECLOSURES.

See FORECLOSURES, 3.

ISSUING WARRANT.

See SEDUCTION, 12.

JOINT ACTION.

See SWAMP LANDS, 4.

JOINT CONVERSION.

See TROVER, 3.

JOINT DEFENDANTS.

See DECLARATION, 2: EJECTMENT, 1: FINDING OF FACTS, 2: FRAUD, 2: REPLEVIN, 5: SUPERIOR COURT OF GRAND RAPIDS, 3.

JOINT DUTY.

See ADJOINING PROPRIETORS, 3, 6.

JOINT OCCUPATION.

See EJECTMENT, 1.

JOINT PLAINTIFFS.

See EXEMPTIONS, 2.

JOINT TRESPASSERS.

See TROVER, 3.

JUDGMENT.

1. Under a charter providing, in case of a fine which it authorizes to be imposed on conviction of certain offenses, for the amount of the fine "to be made of the property of the defendant, if any such can be found," and if not, then imprisonment, a judgment that in case the defendant did not pay the fine and costs she should be at once committed to the county jail, is unauthorized.—*Sheldon v. Hill, 171.*
2. Proceedings resulting in such a judgment, and a mittimus void on its face on the same ground, afford no justification to the justice before whom they were taken, or to the officer who executed them, against the action of the person thereby unlawfully imprisoned.—*Ibid.*

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3. A justice's judgment cannot be attacked collaterally upon the ground of failure to make proof of the authority of the plaintiff's attorney, as required by the statute (*Comp. L. 1871, § 5305*) in case the defendant does not appear.—*Reed v. Gage, 179.*
4. A motion to vacate a judgment docketed in the circuit upon a transcript filed therein of a justice's judgment, is a collateral attack; and the validity of the justice's judgment is not assailable in that way for want of proof of authority of the plaintiff's attorney, as required by the statute (*Comp. L., 1871, § 5305*), on failure of defendant to appear.—*Mayhew v. Snell, 182.*
5. An objection to a judgment entered on special findings of fact, that it is not in form one in trespass, in accordance with the action brought, but is one appropriate to assumpsit, is of no force, since the imperfection would be cured by the statute of jeofails, and, moreover, a proper judgment could be entered in the supreme court on the findings.—*Ferton v. Feller, 199.*

See AMENDMENTS: CORPORATIONS, 5, 6: EVIDENCE, 13, 20: FINDING OF FACTS, 2: FRAUD, 5: LOG-LIEN LAW, 1: PRACTICE IN CIRCUIT COURTS, 1, 6: PRACTICE IN SUPREME COURT, 3: REPLEVIN, 3: TROVER, 2, 3.

JUDGMENT CREDITORS.

See EQUITY JURISPRUDENCE, 9, 10: FRAUDULENT TRANSFERS, 2: REMEDY.

JUDICIAL SALES.

See CHANCERY SALES: EQUITY JURISPRUDENCE, 8–10: EXECUTION SALES.

JURISDICTION.

Of the person: See GARNISHEE PROCEEDINGS, 4–6: SERVICE OF PROCESS, 1–4: SUPERIOR COURT OF GRAND RAPIDS, 1–3.

See AMENDMENTS: EQUITY PLEADING AND PRACTICE, 4, 5, 11: EVIDENCE, 13: PRACTICE IN CIRCUIT COURTS, 6–8.

JURY.

See PRACTICE IN SUPREME COURT, 1: SPECIAL QUESTIONS TO JURY.

JURY TRIAL.

See SPECIAL QUESTIONS TO JURY, 1–10.

JUSTICE OF THE PEACE.

See FALSE IMPRISONMENT, 1: JUDGMENT, 2.

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JUSTICE'S COURTS.

See GARNISHEE PROCEEDINGS, 7: JUDGMENT, 3, 4.

JUSTIFICATION.

See JUDGMENT, 2: LIBEL, 4, 5: TAXATION, 9.

LACHES.

See ESTOPPEL, 2: MORTGAGES, 2: SPECIFIC PERFORMANCE, 4, 7.

LAND CONTRACTS.

Parties under contract to purchase land and to keep the premises in as good condition as at the date of the contract until by their payments they become entitled to a deed, are not at liberty in the meantime to take off the timber; and they cannot set up in defense to their note for the contract price of the lands, damages suffered by them in being deprived, by reason of defects in the title, of the opportunity of lumbering on the premises. One cannot be damnified by being deprived of the opportunity of doing what he has no right to do.—*Jennison v. Stone, 99.*

See DEEDS OF GIFT, 1, 2: EXECUTION LEVY, 1: PROMISSORY NOTES, 4: SPECIFIC PERFORMANCE, 3–8.

LANDLORD AND TENANT.

One who merely makes an arrangement to, and does occupy jointly with another who has been left in possession of premises originally taken by virtue of a lease to him and and another, does not thereby, in the absence of any dealing with the original lessor, become tenant to such lessor.—*Carver v. Palmer, 342.*

See CONTRACTS, 9.

LAWFUL POSSESSION.

See REPLEVIN, 8.

LEGAL TITLE.

See EJECTMENT, 2: EQUITY JURISPRUDENCE, 9, 10: EXECUTION LEVY, 1: EXECUTION SALES, 10.

LEGISLATION.

See SUNDAY LIQUOR LAW, 2–4.

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LEGISLATIVE AUTHORITY.

See MUNICIPAL BOARDS, 3.

LEGISLATIVE QUESTIONS.

See SPECIAL QUESTIONS TO JURY, 9.

LESSEE.

See REPLEVIN, 1.

LESSOR.

See REPLEVIN, 1.

LETTER.

See EVIDENCE, 35.

LEVY.

See EQUITY JURISPRUDENCE, 9, 10: EXECUTION LEVY, 1-10.

LIABILITY OF STOCKHOLDERS.

See CORPORATIONS, 3-8.

LIBEL.

1. In an action for libel where injury to one's business is alleged, the amount of his sales for the year in which the libel was published may be shown in evidence, though it covered some time previous to the publication; but the defendants should not be precluded from drawing out the facts in detail afterwards, so as to enable the jury to distinguish between the business before and after the publication.—*Whittemore v. Weiss, 348.*
2. Other similar publications, made by defendants on the same or the following day, are held competent evidence in an action for libel, as bearing on the question of malice.—*Ibid.*
3. In an action for libel for publishing a statement in substance that the plaintiff, who was then agent for the Steinway piano alone, had formerly been agent for both that and the Knabe, and while agent for both had universally recommended the Knabe as superior in every respect, where the defendants had undertaken to prove the publication to be true, it was held competent in rebuttal to show the comparative number of each sold by plaintiff during the period he was engaged in selling both.—*Ibid.*

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4. To make out a defense by way of justification of libel, the truth of the publication must be proved just as it is charged; and proving the truth of a part of the charge made in the publication is not a defense.—*Ibid.*
5. Good faith cannot protect a false publication; nor can one excuse himself for making a mistaken assault upon his neighbor's reputation by showing the absence of malice when, even had his charge been true, there was no proper purpose in bringing the matter to public notice.—*Ibid.*
6. Counter publications which are not libelous and could have no force as a provocation are not admissible in evidence in mitigation of damages.—*Ibid.*
7. When the publication is actionable *per se*, if maliciously published, the recovery, though the declaration alleged as damages only a loss of trade to the plaintiff, could not properly be limited by the judge's charge to nominal damages merely, whatever the proof as to the influence upon plaintiff's business.—*Ibid.*

LIENS.

For taxes paid: See TAX LIENS.
See LOG-LIEN LAW, 1–5.

LIMITATION.

See CONTRACTS, 7.

LIMITED JURISDICTION.

See SUPERIOR COURT OF GRAND RAPIDS, 1–4.

LIQUORS.

See CONTRACTS, 3–6, 8, 11, 12: SET-OFF: SUNDAY LIQUOR LAW, 1–4.

LIQUOR TAX.

1. The right of villages to the liquor tax collected within their borders is sustained; and such a tax, belonging to a village, having been assessed and collected by the township officers and used for township purposes, *mandamus* is granted to require it to be paid over to the village authorities.—*Decatur v. Town Board of Decatur*, 335.
2. The question involved being purely one of law, and there being no disputed questions of fact, the claim is in no proper sense a disputed claim, requiring a formal trial; and it would be idle to send such a case to a jury when it would be the duty of the court to instruct the jury to return a verdict for the relator.—*Ibid.*

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LOCAL CONTRIBUTION.

See REMOVAL OF COUNTY SEAT, 2.

LOCAL TAXES.

See COMMON COUNCIL: MUNICIPAL BOARDS, 3.

LOG-LIEN LAW.

1. The log-lien law (*Sess. L. 1873, p. 466*) is a very crude and imperfect statute, and, if practicable at all as a law, can only be safely applied to the simplest cases. It contemplates proceedings in the nature of a suit *in rem* to enforce a lien, and not one for the recovery of personal damages; and a personal judgment is not authorized.—*Clark v. Adams, 159.*
2. This statute, being one conferring a new right to be enforced by a summary remedy, is to be construed strictly, and all material preliminaries to the right of suit must be complied with, and the record must show it.—*Ibid.*
3. An allegation, in the declaration under this statute, that the plaintiffs, on a day named, "caused to be mailed to each of said defendants a notice of the filing of said petition or statement, as required by the act aforesaid," is not an explicit statement of the service of such notice "by depositing the same in the postoffice, directed to the owner of the logs or timber, his agent or attorney, at his or their place of residence, and paying the full postage thereon," which is the mode of service by mail expressly specified by the statute.—*Ibid.*
4. The provision of the statute that the plaintiff shall allege the filing of the application or petition for a lien, and that all allegations relating thereto shall be taken to be true unless expressly denied under oath in the answer, does not operate to require a denial of notice on oath in order to put the plaintiff to proof of such notice as the statute specifies. —*Ibid.*
5. An offer to prove that the plaintiffs on a day named caused to be mailed to each of the defendants a notice in the words and figures following, etc., is not an offer to show such service by mail as the statute requires, in that it does not include a proposal to show that the notice was directed to each defendant at his place of residence, or that full postage, or any postage, was paid; and such defect in the proof of service is fatal.—*Ibid.*

LOSS OF TRADE.

See LIBEL, 1, 3, 7.

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MAGISTRATE.

See FALSE IMPRISONMENT, 1.

MAIL.

See LOG-LIEN LAW, 3-5: SERVICE BY MAIL.

MAKING COMPLAINT.

See EVIDENCE, 36, 37.

MALICE.

See FALSE IMPRISONMENT, 2: LIBEL, 2, 5, 6.

MANDAMUS.

1. The water commissioners in this case having a remedy in their own hands to provide funds to meet the bonds about maturing by issuing new bonds for that purpose, as they are authorized to do, their application for *mandamus* to require the common council to raise the money by taxation is denied. —*Water Commissioners v. Common Council of East Saginaw*, 164.
2. The writ of *mandamus* is in most cases discretionary, and where the respondents have acted in good faith, and the question at issue is one more of policy than of right or power, and it is not made to appear that any serious evils will result, the court may justly exercise its discretion and abstain from interfering.—*Ibid.*

See LIQUOR TAX, 1, 2: SUPERVISORS, 2: TOWN TREASURER.

MARKET PRICE.

See SALES OF GOODS, 4.

MARRIED WOMEN.

See DIVORCE: EVIDENCE, 11: EXEMPTIONS, 2: WILLS, 1-3.

MARSHAL.

See EVIDENCE, 3.

MASON WORK.

See BUILDING CONTRACTS, 2, 4.

MASONS.

See EVIDENCE, 21.

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MASTER AND SERVANT.

1. Employés are held bound to bear the consequences of all the ordinary risks incident to their employment.—*Fort Wayne, Jackson & Saginaw R. R. Co. v. Gildersleeve*, 135.
2. A servant has a right to repose confidence in the prudence and caution of his employer and to rely upon his not putting him in charge of implements which, from improper construction or other causes, are so dangerous that a prudent man would not make use of them.—*Ibid.*
3. Whether where one undertakes the employment, or continues in it without protest, notwithstanding he knows that by so doing he is and will be required to make use of implements of improper construction and dangerous, the liability to injury therefrom is to be considered as an exception to the rule as to risks incident to the employment:—*Quære?*—*Ibid.*
4. An employer cannot properly be held to be under so strict obligation to his servants as to be required under all circumstances to make use only of the safest known appliances and instruments, and to be held responsible for any failure to discard what is not such and to supply its place with something better and safer.—*Ibid.*
5. This case is held to be ruled by *Fort Wayne, Jackson & Saginaw R. R. Co. v. Gildersleeve, supra, p. 133.*—*Botsford v. Mich. Central R. R. Co., 256.*

See EVIDENCE, 18: RAILROADS, 12.

MATTERS EQUALLY KNOWN TO DECEASED.

See EVIDENCE, 25.

MATTERS OF SCIENCE.

See EVIDENCE, 21-23.

MAYOR.

See ATTORNEY.

MEANING OF WORDS.

See EVIDENCE, 34.

MEANS ADAPTED TO OBJECT NAMED.

See SUNDAY LIQUOR LAW, 3.

MEASURE OF DAMAGES.

See FRAUD, 5: TROVER, 1.

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MEMORANDUM.

See SALES OF GOODS, 3–6.

MINING COMPANIES.

See CORPORATIONS, 2.

MINORS.

See SUNDAY LIQUOR LAW, 2–4.

MISJOINDER.

See EXEMPTIONS, 2.

MISREPRESENTATIONS.

See FRAUD, 1–5: PROMISSORY NOTES, 2, 3.

MISTAKE.

It is essential to the granting of relief in equity on the ground of mistake, that it should be made to appear that there was an error on both sides, and the mistake alleged must be admitted or distinctly proved.—*Ludington v. Ford, 123.*

See ARBITRATION, 1–3: DEEDS, 4: ELECTIONS, 1, 2: RESULTING TRUSTS: TROVER, 1.

MISTRIAL.

See SPECIAL QUESTIONS TO JURY, 10.

MITIGATION.

See LIBEL, 6.

MITTIMUS.

See JUDGMENT, 1, 2.

MONEY HAD AND RECEIVED.

See CONTRACTS, 1: SET-OFF.

MORTAR.

See EVIDENCE, 21–23.

MORTGAGEES.

See FORECLOSURES, 1, 2: MORTGAGES.

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MORTGAGES.

1. A mortgage in common-law form, executed prior to the statute which deprived mortgagees of the right of possession, gave the mortgagee or his assigns the right to go into the enjoyment of the lands and hold them until redeemed.—*Hoffman v. Harrington, 392.*
2. Where no steps have been taken to redeem such a mortgage for nearly forty years after its maturity, and more than thiry after an open attempt to foreclose, it will require a very strong showing to authorize a bill to redeem.—*Ibid.*
3. The right to redeem from such a mortgage, if outstanding, could not affect the right of possession, and could only be asserted by bill.—*Ibid.*
4. Where a purchase price mortgage has been executed and deposited in escrow to await completion of title in the mortgagor in fulfillment of a verbal bargain by the mortgagee to sell the land to the mortgagor, and the title to the land in the meantime passes into other hands, the delivery of the mortgage in violation of the arrangement will not operate to make it a valid mortgage, binding upon the mortgagor.—*Powell v. Conant, 396.*
5. The verbal bargain being a mere nullity, the mortgage when executed was without consideration, and the delivery in escrow, being only a conditional deposit, was at all times subject to recall before condition performed.—*Ibid.*
6. A mortgage without consideration when executed cannot be made operative by a fraudulent delivery, without the mortgagor's acquiescence, by one with whom it had been deposited in escrow to await the completion of title in the mortgagor, in accordance with an arrangement with the mortgagee.—*Ibid.*
7. A mortgage made conditional on removal of certain specified defects of title is held enforceable on performance of the condition, and not defeasible by a showing of other defects not specified in the condition.—*Goodenow v. Curtis, 505.*

See BUILDING CONTRACTS, 5, 6: CHANCERY SALES, 3–5: DEEDS, 1–5: EQUITY PLEADING AND PRACTICE, 17, 18: ESTOPPEL, 3: EVIDENCE, 1: FORECLOSURES, 1–5: FRAUD, 6, 7: RECITALS, 1, 2: RES ADJUDICATA, 1, 2.

MOTIONS.

To dismiss: See EQUITY PLEADING AND PRACTICE, 4, 5: PRACTICE IN SUPREME COURT, 4.

To set aside: See EXECUTION SALES, 1, 2, 7: PRACTICE IN CIRCUIT COURTS, 7–10.

To strike from docket: See PRACTICE IN SUPREME COURT, 5.
See JUDGMENT, 4.

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MOTIVES.

See EVIDENCE, 42: FALSE IMPRISONMENT, 2, 3: REMOVAL OF COUNTY SEAT, 2.

MULTIPLICITY OF SUITS.

A court of law will endeavor to prevent circuity and multiplicity of suits, where the circumstances of the litigant parties are such that, on changing their relative positions of plaintiff and defendant, the recovery by each would be equal in amount. —*Shermer v. Merrill, 284.*

MUNICIPAL BOARDS.

1. The board of water commissioners of a city, who have, in pursuance of the act by virtue of which they were called into existence, issued bonds of the city which it is made their official duty to see are paid as they fall due, have an interest not common to all citizens, in the common council performing their duty in regard to raising funds to meet such payment.—*Water Commissioners v. Common Council of East Saginaw, 164.*
2. And while it is true the bond-holders have a remedy against the city in case the bonds are not met at maturity, that would not justify the commissioners in sitting quietly by, knowing that such bonds were maturing, and make no efforts to provide funds to meet them.—*Ibid.*
3. The query is suggested whether it is competent for the legislature to confer upon boards created by it within cities the power to control the discretion of the common council as to the amount of moneys to be raised for local purposes, or to give them authority beyond that of mere agents or assistants of the council.—*Ibid.*

See MANDAMUS, 1.

MUNICIPAL COURTS.

See SUPERIOR COURT OF GRAND RAPIDS, 2.

MUTUAL ASSENT.

See SALES OF GOODS, 7.

NAMES.

See EVIDENCE, 20.

NECESSITY.

See RAILROADS, 3.

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NEGLIGENCE.

1. The law is not so absurd as to assume to hold any one responsible upon the ground of negligence for not doing that which it was practically under the circumstances impossible to do.—*Mich. Central R. R. Co. v. Burrows*, 6.
2. Where the law creates a duty or charge, and the party is unable to perform it without any default in him, and has no remedy over, then the law will in general excuse him.—*Ibid.*

See ADJOINING PROPRIETORS, 1-6: CORPORATIONS, 3-8: EVIDENCE, 18: MASTER AND SERVANT, 1-4: RAILROADS, 1-5, 12.

NEW ROLL.

See TAXATION, 8.

NOMINAL DAMAGES.

See LIBEL, 7.

NON-NEGOTIABLE PAPER.

See PROMISSORY NOTES, 10.

NON-USER.

See REMEDY.

NOTES OF WHOLE TRIAL.

See BILLS OF EXCEPTIONS, 2.

NOTICE.

See CHANCERY SALES, 1, 2: CORPORATIONS, 1: EQUITY PLEADING AND PRACTICE, 9: EVIDENCE, 31: EXECUTION SALES, 5, 12, 13, 14: FINDING OF FACTS, 1: FORECLOSURES, 1: LOG-LIEN LAW, 3-5: PRACTICE IN CIRCUIT COURTS, 1, 2: PRACTICE IN SUPREME COURT, 5: RECOUPMENT: REMOVAL OF COUNTY SEAT, 1: SERVICE BY MAIL: TAXATION, 7.

NUISANCE.

See EQUITY JURISPRUDENCE, 1.

NUMBER OF SHARES.

See EXECUTION SALES, 4-6, 8-14.

NUNC PRO TUNC.

See PRACTICE IN CIRCUIT COURTS, 5.

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OBJECTIONS.

See EVIDENCE, 19, 40: PRACTICE IN SUPREME COURT, 9.

OBSTRUCTIONS.

See HIGHWAYS, 1-3.

OCCUPANCY.

See CONTRACTS, 9: LANDLORD AND TENANT: SPECIFIC PERFORMANCE, 6.

OFFENSES.

See CRIMINAL COMPLAINTS, 1-3: INFORMATIONS, 1-3: ORDINANCES.

OFFICE.

See TOWN TREASURER.

OFFICER.

See CORPORATIONS, 1: EVIDENCE, 3: EXECUTION LEVY, 2-7: FORECLOSURES, 5: JUDGMENT, 2: TOWN TREASURER.

OFFICIAL ACTION.

See TAXATION, 10.

OFFICIAL CHARACTER.

See EVIDENCE, 3.

OFFICIAL DUTY.

See EXECUTION LEVY, 3: MUNICIPAL BOARDS, 1, 2.

OFFICIAL TERM.

See EXECUTION LEVY, 2, 7.

OFFSET.

See SET-OFF.

OPINIONS.

See EVIDENCE, 21-23: SEDUCTION, 11.

ORAL AGREEMENTS.

See CONTRACTS, 2: EJECTMENT, 2: INSURANCE 4: SPECIFIC PERFORMANCE, 1, 2, 4-8, 11.

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ORDERS.

For liquors: See CONTRACTS, 11, 12.
Nunc pro tunc: See PRACTICE IN CIRCUIT COURTS, b.
Of confirmation: See EQUITY PLEADING AND PRACTICE, 6–8.
Pro confesso: See EQUITY PLEADING AND PRACTICE, 13, 14.

ORDINANCES.

A village ordinance cannot go beyond the charter in providing penalties for offenses.—*Sheldon v. Hill, 171.*
See EQUITY JURISPRUDENCE, 1–3: WARRANT.

ORIGINAL CONSIDERATION.

See EXEMPTIONS, 1.

ORIGINAL TRANSACTION.

See ACCOUNT STATED, 3.

OTHER SIMILAR PUBLICATIONS.

See LIBEL, 2.

OUTSTANDING TITLE.

See ESTOPPEL, 3.

OVER DRAFT.

See FINDING OF FACTS, 1.

OVERRULING DEMURRER.

See PRACTICE IN CIRCUIT COURTS, 1.

OWNERSHIP.

See ESTOPPEL, 1: RAILROADS, 10.

PARCELS.

See CHANCERY SALES, 2: EXECUTION SALES, 5, 12-14.

PAROL AGREEMENTS.

See CONTRACTS, 2: EJECTMENT, 2: INSURANCE, 4: SPECIFIC PERFORMANCE, 1, 2, 4–8, 11.

PAROL EVIDENCE.

See GUARANTY, 8.

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PARTIAL STATEMENT.

See FRAUD, 3.

PARTIES.

See CERTIORARI, 2: CONTRACTS, 1: DECLARATION, 2, 3: EQUITY JURISPRUDENCE, 4: MUNICIPAL BOARDS, 1: PROMISSORY NOTES, 7: VOLUNTARY SUBSCRIPTIONS, 6.

PARTNERS.

See ARBITRATION, 2: PROMISSORY NOTES, 6.

PARTNERSHIP.

See EVIDENCE, 31: INSURANCE, 1.

PART PERFORMANCE.

See SPECIFIC PERFORMANCE, 11.

PASSENGERS.

See CORPORATIONS, 3, 8.

PATENTS.

See EVIDENCE, 32.

PAYMENT.

See CHATTEL MORTGAGES: EQUITY JURISPRUDENCE, 6: FINDING OF FACTS, 1.

PECULIAR MEANING.

See EVIDENCE, 34.

PENALTIES.

See ORDINANCES.

PERFORMANCE.

See MORTGAGES, 7: SPECIFIC PERFORMANCE, 1: VOLUNTARY SUBSCRIPTIONS, 1–5.

PERSONAL JUDGMENT.

See LOG-LIEN LAW, 1.

PERSONAL LIABILITY.

See DEEDS, 1–5.

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PEW RENTS.

See BUILDING CONTRACTS, 4.

PHYSICIANS.

See EVIDENCE, 6: SEDUCTION, 11.

PLACE.

See CONTRACTS, 3, 8, 11: EXECUTION LEVY, 5.

PLAINTIFF'S ATTORNEY.

See JUDGMENT, 3, 4.

PLEA.

See WAIVER.

PLEADINGS.

See EQUITY PLEADING AND PRACTICE: RECOUPMENT.

POLICY.

See INSURANCE, 1–5: SPECIAL QUESTIONS TO JURY, 9.

POLITICAL QUESTION.

See REMOVAL OF COUNTY SEAT, 3.

POSSESSION.

See MORTGAGES, 1–3: RAILROADS, 11: REPLEVIN, 1, 6–8: SPECIFIC PERFORMANCE, 5, 6.

POSSESSION OF LAND.

See CERTIORARI, 1.

POWER OF SALE.

See FORECLOSURES, 4, 5.

PRACTICE IN CIRCUIT COURTS.

1. On overruling a demurrer to a declaration in assumpsit upon promissory notes, it is not regular to give final judgment at once for a given sum in damages, but if the case be not a proper one for pleading over, the correct practice is to award judgment interlocutory with a reference to the clerk to assess the damages under the statute upon notice.—*Mason v. Reynolds, 60.*

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2. Defendants after appearance are entitled to be heard upon the assessment of damages, and to have notice thereof.—*Ibid.*
3. On judgment of reversal in the circuit on a special appeal from a justice's judgment against a garnishee, the latter is entitled to costs.—*Lorman v. Phœnix Ins. Co.*, *65*.
4. A plaintiff who has annexed the common counts to a special count upon a contract of employment, may on the trial abandon his special count, and seek to recover on the common counts.—*Wyman v. Crowley*, *84*.
5. After return made of writ of error the circuit court has no authority, where no bond under the statute (*Comp. L. 1871*, § *7122*) has been filed to stay or supersede execution, to allow a bond to be filed *nunc pro tunc* and operate as a *supersedeas;* the power, if any, after return to grant such relief is in the supreme court.—*Worden v. Judge of Manistee Circuit*, *111*.
6. A court cannot lawfully render judgment against a party who has not appeared, without some evidence of jurisdiction; and the statute (*Comp. L.*, §§ *5724*, *5732*) only allows a default on proof of service.—*Denison v. Smith*, *155*.
7. Where counsel have appeared and consented to the hearing of a motion before the circuit judge at chambers, and have there appeared and opposed the motion upon its merits, making no objection to the jurisdiction, they will not be permitted, after having been beaten on the merits, to make in the court of review a technical objection to the right of the judge to hear and determine the motion at chambers.—Per MARSTON, J., COOLEY, CH. J., concurring.—*Blair v. Compton*, *414*.
8. Motions to set aside execution sales are admissible; and the order of the circuit court upon such a motion ought not to be reviewed on *certiorari* upon questions going only to the propriety of the order and where the authority to hear and determine the matter upon the papers submitted is undisputed.—Per CAMPBELL, J.—*Ibid.*
9. A sheriff's return may be disputed by the parties over whose interests he has attempted to declare evidence of jurisdiction.—Per CAMPBELL, J.—*Ibid.*
10. Where a motion to set aside an execution sale has been heard and granted upon a showing disputing the essential facts of service alleged in the sheriff's return, this action cannot be reviewed on such return alone considered as true, where the record fails to show that the ground of decision may not have been these very disputed questions of fact as to the service.—Per CAMPBELL, J.—*Ibid.*

See AMENDMENTS: CHARGE TO THE JURY, 5: CONTRACTS, 10: EQUITY PLEADING AND PRACTICE: EXECUTION SALES, 1, 2,

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7: PRACTICE IN SUPREME COURT, 6-8: SUSPENDED SENTENCE.

PRACTICE IN SUPREME COURT.

1. A court of review will not consider the amount of the verdict, or the weight of the evidence. The jury will be presumed to have done no legal wrong so long as they acted within their province, and their verdict will not be disturbed, unless the court has committed legal error.—*Elliott v. Van Buren, 49.*
2. Questions in reference to the taxation of costs in the court below are not brought up for review by the writ of error. —*Lorman v. Phœnix Ins. Co., 65.*
3. Where a cause is tried by the court without a jury and a special finding filed, the weight of the evidence will not be considered on review, but it being conceded there was evidence tending to prove the facts found, the only question left open in that regard is, whether the facts as found support the judgment.—*Kling v. Fries, 275.*
4. Motion by complainant and appellee to dismiss appeal for the reason that no case had been settled, the testimony having been taken in open court, is denied where the evidence having been taken by the stenographer, the court below has certified up, though after the expiration of the statutory period, what is stated in the certificate to be the whole evidence; but the certificate failing to state that a case had been settled, leave is granted to complainant, if not satisfied with the proofs as returned, to have the case resettled.—*McBride v. Rea, 347.*
5. Motion to strike from docket on ground that cause was noticed by counsel for defendant in error who had not caused an appearance to be entered in supreme court, will not be heard without notice, in the absence of counsel representing the other side.—*Frost v. Lawler, 348.*
6. The practice of taking general and obscure exceptions at the moment, in order to cover the case and enable counsel on subsequent critical examination to raise points which have never been suggested at all to the mind of the trial judge, is objectionable on many grounds, and is contrary to the theory upon which points are allowed to be raised by exceptions.—*Turner v. People, 363.*
7. An allegation of error will not prevail unless the record as made up affirmatively shows that the error alleged was in fact committed.—*Ibid.*
8. Where complaint is made of a charge to the jury, in reference to a claim that the credibility of the prosecutrix as a wit-

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ness was destroyed by her denial on cross-examination of having given certain testimony before the examining magistrate, which suggested that the deposition taken before the magistrate might not contain the exact words of the witness, but the bill of exceptions does not set forth the deposition or the cross-examination, nor show that the deposition contained in fact what the witness denied, it will not be presumed in support of the allegation of error that there was a material variance between the deposition and the testimony such as to involve a substantial contradiction under oath. —*Ibid.*

9. An objection to the admission of documentary evidence, which fails to state the particular grounds of incompetency, is too general to raise any question for review.—*Lobdell v. Merch. & Manf. Bank*, *408*.
10. In this case, which is *certiorari* to review an order of the circuit judge setting aside upon motion an execution levy and sale, the supreme court being equally divided, the order is affirmed under the statute.—*Blair v. Compton*, *414*.
11. Where there was evidence tending to sustain a fact found by the court below, his decision upon the weight of the evidence will not be reviewed.—*Webber v. Donnelly*, *469*.
12. Where an objection has been sustained to a question which was put with the view of establishing a fact which the court afterwards found in favor of the party who put the question, that ruling becomes immaterial, and will not be reviewed. —*Ibid.*
13. The decree below having erroneously denied the defendant his full costs, but he having failed to appeal, on affirmance upon complainant's appeal, which is held to be utterly without merit, the payment of such costs is imposed as damages for the vexation.—*Goodenow v. Curtis*, *505*.

See ASSIGNMENT: ASSIGNMENTS OF ERROR, 1-3: EQUITY PLEADING AND PRACTICE, 5-7, 10: EVIDENCE 19: EXCEPTIONS: FINDING OF FACTS, 1: JUDGMENT, 5: LIQUOR TAX, 2: PRACTICE IN CIRCUIT COURTS, 8, 10: RECOUPMENT: REMEDY: WEIGHT OF EVIDENCE.

PRECISION.

See CRIMINAL COMPLAINTS, 1: PRELIMINARY EXAMINATIONS, 2.

PRE-EXISTING CREDITORS.

See FRAUDULENT TRANSFERS, 2.

PREFERENCES.

See RAILROADS, 3.

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PRELIMINARY EXAMINATION.

1. Under our statutes it is not requisite that an examining magistrate should make and return or keep any record of a specific finding as to the commission of the offense charged, or as to there being probable cause to believe the accused committed it, but if he either let him to bail or commit him for want of bail or because the offense is not bailable by a justice, and certify and return all the examinations and recognizance, that is all the statutes contemplate as essential as the basis for filing an information.—*Turner v. People*, 363.
2. A preliminary examination before a justice is in no proper sense a trial, and the rules and principles which govern in respect to the frame and construction of criminal pleadings, the scope and import of trial issues and the relevancy of evidence thereto, are not applicable to such proceedings.—*Ibid.*

See CRIMINAL COMPLAINTS, 3: INFORMATIONS, 1, 2: SEDUCTION, 9.

PRESIDENT OF BANK.

See AGENCY, 3: GUARANTY, 6–8.

PRESUMPTIONS.

See BUILDING CONTRACTS, 2: CONTRACTS, 5, 6, 11: ELECTIONS, 3: EVIDENCE, 26: EXECUTION LEVY, 3, 5: PRACTICE IN SUPREME COURT, 8: SEDUCTION, 8: TAXATION, 2.

PREVIOUS ACTION.

See SUPERVISORS, 2.

PREVIOUS CHASTITY.

See SEDUCTION, 6–8.

PREVIOUS DEALINGS.

See SALES OF GOODS, 5, 6.

PREVIOUS EQUITIES.

See CHANCERY SALES, 5.

PREVIOUS SEDUCTION.

See SEDUCTION, 7.

PRICE.

See SALES OF GOODS, 1–4.

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PRINCIPAL AND AGENT.

See AGENCY, 1, 2: GUARANTY, 6–8.

PRINCIPAL AND SURETY.

See FRAUD, 4: GUARANTY, 2.

PRINCIPAL DEFENDANT.

See GARNISHEE PROCEEDINGS, 6.

PRIOR CHANCERY SUIT.

See RES ADJUDICATA, 1, 2.

PRIOR INDEBTEDNESS.

See FRAUD, 7.

PRIVATE PARTIES.

See REMOVAL OF COUNTY SEAT, 3.

PROBABLE CAUSE.

See FALSE IMPRISONMENT, 6.

PROBABILITIES.

See EVIDENCE, 26.

PROCEEDINGS FOR CONTEMPT.

See EQUITY PLEADING AND PRACTICE, 10–12.

PROCESS.

See AMENDMENTS: EXECUTION SALES, 1: GARNISHEE PROCEEDINGS, 4–6: JUDGMENT, 2: PRACTICE IN CIRCUIT COURTS, 6: SERVICE OF PROCESS, 1–4: SUPERIOR COURT OF GRAND RAPIDS, 2–4: TAXATION, 4, 5: WARRANT.

PRO CONFESSO.

See EQUITY PLEADING AND PRACTICE, 13, 14.

PRODUCTION OF THE PROPERTY.

See EXECUTION SALES, 8, 11.

PROHIBITORY LIQUOR LAW.

See CONTRACTS, 3–6, 8, 11, 12: SET-OFF.

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PROMISES.

In aid of railroad: See VOLUNTARY SUBSCRIPTIONS, 1–4.
See SEDUCTION, 3, 5, 6.

PROMISSORY NOTES.

1. The following instrument is held to be a promissory note, viz.: "For value received I promise to pay to the Northern Central Michigan Railroad Company or bearer the sum of fifteen hundred dollars, to be paid twenty per cent. a month from the first day of July, 1871, towards the right of way and grading said railroad from Jonesville to the city of Lansing."—*Wright v. Irwin, 32.*
2. The exclusion of evidence that the promissory note sued upon was obtained without consideration and by false inducements and fraudulent representations, is not error where the plaintiff is presumptively a *bona fide* holder, and before any evidence has been introduced to impeach his position as such. —*Ibid.*
3. It having been made to appear that plaintiff was not a *bona fide* holder of the note sued upon, it was error to exclude evidence tendered to show that the only inducement for the giving of the note was the statement to the maker by the director of the road to whom it was given, that the road would run through a named street and across his land, and that the depot would be located there, which statement was in point of fact not true.—*Ibid.*
4. A note given for the balance due, with interest, on a land contract not drawing interest, on an understanding that the question of the liability to pay interest should nevertheless remain open, is held to be, as to the amount of such interest, without consideration and not enforceable.—*Jennison v. Stone 99.*
5. In an action upon a promissory note, against makers and endorsers, the general issue, unaccompanied by an affidavit denying the execution of the note, under our practice is an admission by each defendant that he signed the instrument as alleged in the declaration, and also that it was executed by the parties declared against.—*Lobdell v. Merch. & Manf. Bank, 408.*
6. And this admission covers the fact of execution by the defendants by the name and description alleged in the declaration, and does away with any necessity of proving partnership between persons signing in a firm name, and charged as partners.—*Ibid.*
7. A bank holding a note as collateral security may, with the assent of the owner, sue upon it in its own name.—*Ibid.*

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8. A promissory note given in consideration of the suppression of proceedings under a criminal complaint, is void in the hands of the promisee who was a party to the illegality, and he cannot enforce collection of it.—*Snyder v. Willey, 483.*
9. Illegality of consideration is a complete defense to the entire contract, though the consideration be in part valid; and it is admitted as a defense, not to benefit the defendant, but to protect courts of justice from being made instruments to compel the execution of a contrivance to violate the law; nor will it be made a condition that restitution be made to the plaintiff of that part of the consideration which is legal; but the law leaves the parties where by their willful violation of it they have voluntarily placed themselves.—*Ibid.*
10. The alteration by interpolating the words "or bearer" in an instrument in form of a promissory note, but made expressly subject to the conditions of a mortgage not payable absolutely, but only on certain contingencies, in no way invalidates or changes the legal effect of the instrument; such an instrument is not negotiable, and the use of the words in question would not make it so.—*Goodenow v. Curtis, 505.*
See EVIDENCE, 1, 28, 29, 39–42: EXEMPTIONS, 1: FORECLOSURES, 1, 2: GUARANTY, 4, 5: LAND CONTRACTS.

PROOF OF AUTHORITY.

See JUDGMENT, 3, 4.

PROOF OF SERVICE.

See EQUITY PLEADING AND PRACTICE, 13: GARNISHEE PROCEEDINGS, 5: LOG-LIEN LAW, 5: SERVICE BY MAIL: SERVICE OF PROCESS, 2, 3.

PROOFS.

See EQUITY PLEADING AND PRACTICE, 1–4: MISTAKE.

PROVOCATION.

See LIBEL, 6.

PROXIMATE CAUSE.

See BUILDING CONTRACTS, 4: RAILROADS, 4, 5.

PUBLIC NECESSITY.

See RAILROADS, 3.

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PUBLIC POLICY.

See WILLS, 1.

PUNITORY DAMAGES.

See TROVER, 1.

PURCHASE.

See CHANCERY SALES, 3, 4.

PURCHASE PRICE CLAIM.

See EXEMPTIONS, 1.

PURCHASER.

See CHANCERY SALES, 5: EVIDENCE, 25: EXECUTION SALES, 2, 14: FORECLOSURES, 1-3.

PURCHASER UNDER A DECREE.

A purchaser under a decree must ascertain at his peril whether the decree was warranted or not; and though the time for appealing from the decree had expired when he purchased, he cannot claim immunity as a *bona fide* purchaser, from the effects of a subsequent order without notice to him, setting the decree aside as unwarrantably entered.—*Ritson v. Dodge*, 463.

QUALITY OF EVIDENCE.

See ASSAULT AND BATTERY, 1.

QUESTIONS NOT RAISED.

See ASSIGNMENT.

QUESTIONS OF FACT.

See EVIDENCE, 29: FALSE IMPRISONMENT, 4: FRAUDULENT TRANSFERS, 2: PRACTICE IN CIRCUIT COURTS, 10: REPLEVIN, 2: SALES OF GOODS, 9.

QUO WARRANTO.

See REMEDY.

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RAILROADS.

1. Railroad companies are bound to have all reasonable and necessary facilities and appliances for conducting and carrying on in a prompt, skillful and careful manner the business in which they are engaged, and for transporting without unreasonable delay the usual and ordinary quantity of freight offered them for transportation, or which might reasonably and ordinarily be expected; but they are not bound to be prepared for unusual and extraordinary contingencies, such as the great Chicago fire, which no ordinary prudence or foresight could reasonably foresee or anticipate.—*Mich. Central R. R. Co. v. Burrows*, 6.
2. Where an unusual contingency has arisen which unexpectedly largely increases the business and thereby prevents the handling of freight with the usual promptness and despatch, the criterion of reasonable diligence is not the usual average rate of speed in ordinary times, but the average running time under the extraordinary and unusual circumstances existing at the time.—*Ibid.*
3. Giving preference to relief goods sent to the sufferers by the great Chicago fire was not such a discrimination against shippers of other freight as to make carriers liable as for negligence for not forwarding freight in the order in which it was received. All general rules must yield to a great public necessity.—*Ibid.*
4. The freezing of apples while being transported by a subsequent carrier is not so direct and natural a result of unreasonable delay by the first carrier, as to make such first carrier liable therefor by reason of such delay.—*Ibid.*
5. Proof of negligent delay by a subsequent carrier, and that without it the injury would have been avoided, is a complete answer to an action seeking to hold the first carrier responsible by reason of its delay for the injury to fruit by freezing while in custody of such subsequent carrier.—*Ibid.*
6. An action to recover back six dollars per car load for freight paid under protest at the rate of twenty-two dollars per car for lumber transported by a railroad company, based on an alleged contract that, in consideration that plaintiff would build a mill and cause the pine timber on his lands near by to be sawed thereat and furnish the lumber to the company for transportation, the company would carry the same for sixteen dollars per car, will fail in the absence of evidence that such an undertaking binding upon the company was in fact made; and the evidence in this case is held to have come short of proving any such promise on behalf of the company.—*Mich. Central R. R. Co. v. Edwards*, 16.

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7. In an action upon a subscription to a railroad company which recognizes the corporation, the existence of the company cannot be disputed, and questions of the regularity of its organization are immaterial.—*Parker v. Northern Central Mich. R. R. Co., 23.*
8. Subscriptions to stock are only binding upon the subscribers when they are so made as to bind the company; and as the statute creates no obligation on the corporation, except upon subscriptions regularly made, no others can be enforced unless they were made upon some actual consideration or agreement binding the company.—*Ibid.*
9. The subscription sued upon in this case, not having been taken by commissioners as required by the statute, cannot be supported except upon some positive consideration proceeding from the company.—*Ibid.*
10. An averment as to a subscription not within the statute, that defendant being desirous that the company should proceed in the building of its road, etc., in consideration thereof did subscribe and sign such subscription, setting it out, in the absence of any averment that the company undertook to build the road in response to the subscription or in reliance on it, or that in building it afterwards they did it in such reliance, or that the company or its agents ever prepared, proposed or sanctioned such subscription, or ever received, accepted or in any way recognized it, fails to allege any consideration for the promise declared upon, and therein falls short of stating a binding contract, or making out a cause of action.—*Ibid.*
11. In an action in the name of the company for the use and benefit of a third person, upon a subscription thus declared upon, where it appeared that the paper was originally got up by a voluntary movement among citizens, and its actual delivery to, or acceptance by the company was not shown, it is error to rule that the production of the instrument at the trial is evidence of its delivery to the plaintiff.—*Ibid.*
12. A railroad company is held not to be guilty of such negligence in making use in its trains of an old mail car which was lower than the others, as to be liable to its servant who knowingly incurred the risk, for an injury resulting from the coupling of such old car with another, though the danger be greater than with cars of equal height.—*Fort Wayne, Jackson & Saginaw R. R. Co. v. Gildersleeve, 133.*

See EVIDENCE, 18: NEGLIGENCE, 1, 2: PROMISSORY NOTES, 1-3: VOLUNTARY SUBSCRIPTIONS, 1-7.

RAISING CROPS.

See SPECIFIC PERFORMANCE, 6.

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RAPE.

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RATIFICATION.

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REAL ESTATE.

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REASONABLE DILIGENCE.

See RAILROADS, 1–5.

REASONABLE DOUBT.

See ASSAULT AND BATTERY, 1.

REASONABLE PRICE.

See SALES OF GOODS, 1–4.

REASONABLE TIME.

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REBUTTAL.

See LIBEL, 3.

RECALL.

See MORTGAGES, 5.

RECEIVERS.

See EQUITY PLEADING AND PRACTICE, 10–12.

RECITALS.

1. An assignment of a mortgage which recites a prior assignment by the same person to another, is of no avail to prove

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title in the assignee named therein, as it is an admission that the assignor had no title to assign.—*Van Vleet v. Blackwood, 334.*

2. The further recital, that the prior assignment was made to one under whom the present assignee claimed, is no evidence of that fact; while one may admit title out of himself, he cannot admit title into any other.—*Ibid.*

RECORD.

See ASSIGNMENT: ASSIGNMENTS OF ERROR, 3: EVIDENCE, 32: PRACTICE IN CIRCUIT COURTS, 10: PRACTICE IN SUPREME COURT, 7, 8: SWAMP LANDS, 4.

RECOUPMENT.

A notice of recoupment averring damages for breach of plaintiff's contract which does not point out in what respect the contract had been broken to defendant's injury, is held too indefinite to allege errors upon.—*Roethke v. Philip Best Brewing Co., 340.*

REDEMPTION.

See EQUITY PLEADING AND PRACTICE, 17: MORTGAGES, 1-3: SPECIFIC PERFORMANCE, 9: TAX LIENS.

REFERENCE TO CLERK.

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REFORMATION.

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REGISTRY.

See ELECTIONS, 3: SPECIAL QUESTIONS TO JURY, 6.

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RELEASE.

See GUARANTY, 5.

RELIANCE ON PROMISE.

See VOLUNTARY SUBSCRIPTIONS, 4.

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REMEDY.

An application by a judgment creditor for leave to file an information in the nature of a *quo warranto* to enforce a forfeiture for non-user of the corporate rights and franchises of a manufacturing company, is denied in the absence of any showing that the statutory remedy provided for judgment creditors, and which is deemed the more appropriate one, was not available.—*Carpenter v. Wayland Wood Manufacturing Co., 413.*

See BUILDING CONTRACTS, 3, 6: CERTIORARI, 1: CONTRACTS, 9: EQUITY JURISPRUDENCE, 3-6: MANDAMUS, 1, 2: MUNICIPAL BOARDS, 2.

REMOVAL.

See CORPORATIONS, 1, 2.

REMOVAL OF COUNTY SEAT.

1. Proceedings for the removal of a county seat are not rendered invalid by reason of the board of supervisors leaving the giving of the requisite notice to the clerk, without prescribing its form or contents, where no mischief is shown to have resulted, and the notice given was in due form, and the supervisors have sanctioned and ratified what was done by canvassing the votes and declaring the result.—*Attorney General v. Supervisors of Lake County, 289.*
2. It is not improper for the supervisors, while considering the question of removing the county seat, to take into the account any local provisions that may be made to relieve the county from the expenses incident to the removal; and where they have passed an unconditional resolution for removal, and the people have voted upon and approved it, no inquiry into motives, either of the supervisors or the people, can be gone into to invalidate the proceedings.—*Ibid.*
3. The question of the removal of a county seat is purely a political question, and does not in any way legally involve the rights of private parties; and if the removal is effected in the manner provided by law, that is conclusive.—*Ibid.*
4. Under our statute (*Comp. L. 1871, § 485*) the decision of the supervisors, in declaring and entering upon their records the result of their canvass of the votes upon a proposition for the removal of the county seat, is conclusive for all purposes whatever, and leaves no question open to contest afterwards; and the removal cannot thereafter be defeated in the courts by a showing that it was carried by illegal votes.—*Ibid.*

RENEWAL.

See SWAMP LANDS, 5.

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RENT.

See CONTRACTS, 9.

REPETITIONS.

See SEDUCTION, 4, 7.

REPLEVIN.

1. Where personal property has been leased, the right to replevy during the lease is with the lessee, and not the lessor; the action of replevin is possessory, and no one not entitled to the possession can maintain it.—*Hunt v. Strew, 85.*
2. In an action of replevin brought by a subsequent purchaser against one holding on an execution levy by virtue of judgment in attachment, there being evidence tending to show an attachment levy, and that plaintiff bought with notice of the proceedings, it is not error to permit the fact of the attachment, and the question of fraud against creditors, to go to the jury.—*Ibid.*
3. A judgment in replevin determines only the right of possession at the time, and is not inconsistent with the right of the party defeated to recover back possession afterwards under a change of circumstances.—*Deyoe v. Jamison, 94.*
4. One who has contracted to purchase personal property on credit, the title to remain in the vendor till payment, does not forfeit his rights by mere neglect to pay by the day named; and the vendor may waive his right to a forfeiture for prior neglect to pay, by seeking afterwards to collect the balance due.—*Ibid.*
5. There was sufficient evidence connecting the two plaintiffs in error in this case with the detention to warrant their being joined as defendants.—*Ibid.*
6. One who has contracted to sell chattels on credit with a present delivery, on condition that the vendee should perform a certain job of work he had contracted to do for the vendor, of the contract price for which a certain portion was to be applied in payment for said chattels, cannot, after the work has been substantially performed, transfer separate from the contract any title or interest in the chattels in his vendee's possession, to a third person, so as to vest in the latter a cause of action in replevin.—*Blaisdell v. Todd, 176.*
7. One holding a mortgage of a span of horses remaining in use on the farm of the mortgagor's wife where they both reside together, cannot, on breach of condition of the mortgage, bring replevin against the wife alone, without first making a demand of her.—*Campbell v. Quackenbush, 287.*

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8. The horses in question being lawfully on the farm, and so in the wife's possession, she cannot be charged as a wrong-doer in relation to them until she has taken some affirmative action; and the absconding of her husband, leaving the horses on the farm, could not of itself make her a wrong-doer.—*Ibid.*

See EVIDENCE, 16: EXEMPTIONS, 2: RESCUE, 1.

REPRESENTATIONS.

See EXECUTION SALES, 5, 13.

REPRESENTATIVES.

See EVIDENCE, 25.

REPUDIATION.

See CONTRACTS, 10: DECLARATION, 4.

REQUESTS TO CHARGE.

See CHARGE TO THE JURY, 3–5.

RES ADJUDICATA.

1. The decree in a chancery cause dismissing a bill brought to have a mortgage declared void because obtained of a minor and by fraud, and to set aside a statutory foreclosure, is held not to be a direct adjudication on the validity of the foreclosure proceedings where the regularity of those proceedings was not put in issue or contested or made the subject of evidence.—*Bonker v. Charlesworth, 81.*
2. The complainant in such chancery suit is held not estopped by that decree from disputing in ejectment the validity of such foreclosure proceedings upon the ground that he was legally bound to bring them into his chancery suit, and that by his failure so to do he had lost the right afterwards to question them in another suit. The validity of the mortgage, and the regularity of a statutory foreclosure of it, are not necessarily connected, but present distinct controversies that may well be made the subject of separate suits.—*Ibid.*

See REMOVAL OF COUNTY SEAT, 4: REPLEVIN, 3.

RE-SALE.

See CHANCERY SALES, 4.

RESCINDING PREVIOUS ACTION.

See SUPERVISORS, 2.

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RESCISSION.

See PROMISSORY NOTES, 9.

RESCUE.

1. One sued under the statute (*Comp. L.* § *6782*) for a rescue of beasts distrained or impounded cannot bring into question the regularity of the distrainor's proceedings; he is expressly remitted to his action of replevin to test the validity of those proceedings.—*Hamlin v. Mack, 103.*
2. The taking away and setting at liberty against law a distrained animal constitutes a rescue, and it is not necessary that positive violence, or menacing or threatening words should be employed to characterize the act as a rescue; and such a taking is esteemed in law a violent taking.—*Ibid.*

See WARRANT.

RESERVATION.

See SWAMP LANDS, 1-5.

RES GESTÆ.

See EVIDENCE, 37, 39: INSURANCE, 7.

RESIDENCE.

See ELECTIONS, 3, 4: TOWN TREASURER.

RES INTER ALIOS.

See CONTRACTS, 13.

RESISTANCE.

See CHARGE TO THE JURY, 6: EVIDENCE, 36.

RESTITUTION.

See PROMISSORY NOTES, 9.

RESTORATION.

See EQUITY PLEADING AND PRACTICE, 11, 12.

RESTRAINT OF TRADE.

See CONTRACTS, 7: EQUITY JURISPRUDENCE, 11.

RESULTING TRUSTS.

One who has voluntarily purchased lands and caused the title to be vested in another who retains them, is precluded by the

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statute (*Comp. L.*, §§ *4120–1*), in the absence of fraud or mistake, from all relief, either at law or in equity.—*Hooker v. Axford*, *453*.

RETURN.

See AMENDMENTS: EQUITY PLEADING AND PRACTICE, 13, 16: EXECUTION LEVY, 5, 6: PRACTICE IN CIRCUIT COURTS, 9, 10: SERVICE OF PROCESS, 2: SUPERIOR COURT OF GRAND RAPIDS, 4.

RETURN DAY.

See EXECUTION LEVY, 2, 7.

REVERSAL.

See PRACTICE IN CIRCUIT COURTS, 3.

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See PRACTICE IN CIRCUIT COURTS, 8–10.

RIGHT OF ACTION.

See REPLEVIN, 1.

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See FORECLOSURES, 3: MORTGAGES, 1–3: REPLEVIN, 3–5.

RIGHTS OF DEBTOR.

See EXECUTION SALES, 14.

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In bulk: See CHANCERY SALES, 2: EXECUTION SALES, 5, 6, 12–14.

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SALES OF GOODS.

1. Where a contract of sale is executory, the price should be fixed distinctly according to some standard, either of amount, or of market, or of reasonableness, or some other method of ascertainment, in order to make the contract complete and binding upon the purchaser.—*James v. Muir*, 223.
2. Where goods are accepted, and nothing has been said about the price, a reasonable price is recognized as correct.—*Ibid.*
3. Where the contract is within the statute of frauds and is executory, the memorandum must name the price, as well where a reasonable price is agreed upon as where any other is; and if the price is left to be arranged by parol, the memorandum will be incomplete.—*Ibid.*
4. Where, in such case, the memorandum is silent as to price, there is at least no implication of a promise to pay at what may happen to be the market rate, which may not always be a reasonable rate.—*Ibid.*
5. The memorandum in question in this case, which is in the form of a receipt of the price of making and delivering certain timber the year before, and an acknowledgement of certain advances (for which interest is promised) upon certain other specified timber, to be thereafter delivered at a specified time and place free of incumbrances, is held not to indicate a sale at all, by itself, as it fails to show whether the delivery of the timber was to be received as a purchase, or as security, or otherwise; it is held not to be a complete transaction by itself, but only a part of some course of dealings, and to be read and applied by their aid.—*Ibid.*
6. And as the previous dealings between the parties embraced other instruments which belonged with this imperfect memorandum relied upon by plaintiff, and which, construed with it, and in the light of the circumstances, made out a complete and intelligible contract, of which such memorandum was only a part, the admission in evidence of such previous dealings and of these prior instruments was not error.—*Ibid.*
7. Where under a contract for the purchase of personal property something remains to be done to identify the property, or put it in condition for delivery, or determine the sum to be paid for it, the presumption is strong, but not conclusive, that by the understanding of the parties the title was not to pass until such act had been fully done; the question is only one of mutual assent.—*Wilkinson v. Holiday*, 386.

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8. While delivery is usually the most significant fact to prove the transfer of title, it is not conclusive, as there may be an express understanding to the contrary, and so likewise there may be an implied one.—*Ibid.*
9. The question in this case, whether by the understanding of the parties the title was to pass with the delivery of the logs to the boom company, under the circumstances is held to be one of fact that ought to have been left to the jury.—*Ibid.*

See CONTRACTS, 3: REPLEVIN, 4, 6.

SATISFACTION.

See CHATTEL MORTGAGES.

SCHOOL TAXES.

See TAX TITLES.

SECURITY.

See EQUITY JURISPRUDENCE, 4–6.

SEDUCTION.

1. Under an information for seduction the introduction of evidence tending to prove one distinct substantive offense is a sufficient election, without any express announcement to that effect, of such offense as the one upon which alone a conviction will be sought, to preclude the proof of any other substantive offense as the basis of a conviction.—*People v. Clark, 112.*
2. Subsequent acts of intercourse cannot be given in evidence, on a trial for seduction, as corroborating testimony, for they have no such tendency.—*Ibid.*
3. Illicit intercourse alone does not constitute seduction, but the complainant must have yielded to some sufficient promise or inducement, and have been thereby drawn aside from the path of virtue she was honestly pursuing at the time.—*Ibid.*
4. Where it appears that illicit intercourse was had between the parties as opportunity offered, at short intervals, to warrant a conviction of seduction for the second or third or later act, there should be clear and satisfactory proof of reformation.—*Ibid.*
5. Where a woman willingly submits to indulge a criminal desire, the fact that a promise of marriage is made as matter of form merely, is not enough of itself to characterize the act as seduction.—*Ibid.*

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6. Illicit intercourse in reliance upon a promise made is not alone sufficient to make the act seduction, but the nature of the promise and the previous character of the woman for chastity must be considered.—*Ibid.*
7. A woman who has been before seduced and has reformed may be again the subject of seduction; and where a reasonable time elapsed between the different acts, a presumption in favor of reformation may arise; but where the repetitions are frequent and the intervals short, as in this case, no such presumption arises, and the burden of proving reformation is upon the prosecution.—*Ibid.*
8. It is competent on a trial for seduction, for the defense to show that the prosecutrix had, previous to the alleged offense, had illicit connection with another man, the chastity of the female at that time being in all cases involved.—*Ibid.*
9. It is not competent to show that the complainant, though present, was not sworn and examined before the magistrate on the preliminary examination of the defendant for the offense in question.—*Ibid.*
10. Evidence of a conspiracy between complainant and her father and mother to inveigle the defendant into a marriage with complainant, and failing of this to prosecute him, is admissible on a trial for seduction.—*Ibid.*
11. The opinions of medical experts, that sexual intercourse under the circumstances described by the complainant, *i. e.*, in a buggy, was highly improbable, if not impossible, and also as to the pain and suffering the complainant would have experienced had such an act taken place, are held admissible.—*Ibid.*
12. The issuing of a warrant in good faith and delivery to an officer to execute, where the defendant was afterwards arrested upon that warrant and bound over for trial, is a sufficient commencement of the prosecution to satisfy the requirement of the statute of limitations.—*Ibid.*

SENTENCE.

See SUSPENDED SENTENCE: VERDICT.

SEPARATE INSTRUMENTS.

See SALES OF GOODS, 6.

SEPARATE LIABILITY.

See FINDING OF FACTS, 2.

SEPARATION.

See DIVORCE: WILLS, 1-3.

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SERVANTS.

See EVIDENCE, 18: MASTER AND SERVANT, 1–4: RAILROADS, 12.

SERVICE.

BY MAIL:

It is a general rule that when service is sought to be made by mail it should appear that the conditions on which the validity of such service must depend had existence, otherwise the evidence must be deemed insufficient to establish the fact of service.—*Clark v. Adams, 159.*

See LOG-LIEN LAW, 3–5.

OF PROCESS:

1. Service in a foreign county under the statute (*Comp. L. 1871, § 5748*) is not authorized until after the record shows proof of service on some of the defendants within the jurisdiction of the court.—*Clark v. Lichtenberg, 307.*
2. A certificate of service with the venue laid in the county of Wayne and city of Detroit, and signed simply "John B. Kendall, sheriff," without specifying of what county, and certifying to a personal service upon defendants named, on a day specified, "in said county of St. Clair," is not sufficient proof of service.—*Ibid.*
3. An endorsement of acceptance of service on behalf of a foreign corporation by parties who therein describe themselves as agents of the corporation, has no legal force by itself as evidence of the fact of such agency, or as proof of such service as the law contemplates.—*Hebel v. Amazon Ins. Co., 400.*
4. All exceptional methods of obtaining jurisdiction over persons, natural or artificial, not found within the state, must be confined to the cases and exercised in the way precisely indicated by the statute.—*Ibid.*

See AMENDMENTS: EXECUTION LEVY, 2–10: GARNISHEE PROCEEDINGS, 1, 24–27: PRACTICE IN CIRCUIT COURTS, 6: SUPERIOR COURT OF GRAND RAPIDS, 3, 4.

SERVICES.

See ATTORNEY: EMPLOYMENT: EQUITY PLEADING AND PRACTICE, 12: ESTATES OF DECEASED PERSONS, 2.

SET-OFF.

A claim for money paid for unlawful purchases of liquors sold in violation of the prohibitory liquor law, may be set off against any lawful demands sued by the vendors. The stat-

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ute providing that money so paid shall be deemed to have been received without consideration, and may be recovered back, the liability for the same is thereby put on the same footing as for any other money had and received.—*Roethke v. Philip Best Brewing Co.*, *340*.

SETTING ASIDE DECREE.

See PURCHASER UNDER A DECREE.

SETTING ASIDE LEVY AND SALE.

See EXECUTION SALES, 1, 2, 7.

SETTLEMENT OF DECREE.

See EQUITY PLEADING AND PRACTICE, 9.

SETTLEMENTS.

While settlements of conflicting claims will not be opened to inquire into the equities, yet such protection is not afforded to a transaction where what the party gives is given under protest that it is not payable, and with an understanding that he reserves his defense to it; a settlement in the nature of a compromise must be made as such, and so understood on both sides.—*Jennison v. Stone*, *99*.

SETTLING CASE.

See EQUITY PLEADING AND PRACTICE, 16: PRACTICE IN SUPREME COURT, 4.

SETTLING CRIMINAL PROSECUTIONS.

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SEVERAL OCCUPANCY.

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See EXECUTION LEVY, 2–10: FORECLOSURES, 5: FRAUDULENT TRANSFERS, 2: PRACTICE IN CIRCUIT COURTS, 9, 10: SERVICE OF PROCESS, 2.

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SICKNESS.

See EVIDENCE, 5, 6.

SIC UTERE TUO UT ALIENUM NON LAEDAS.

See ADJOINING PROPRIETORS, 2.

SIGNATURES.

See PROMISSORY NOTES, 5, 6.

SILENCE.

See EVIDENCE, 44.

SINGLE WITNESS.

See CHARGE TO THE JURY, 4.

SLANDER.

Charging another with having sworn falsely and with having been indicted before the grand jury for false swearing, is slander and actionable *per se.—Brace v. Brink, 91.*

SOURCES OF INFORMATION.

See FALSE IMPRISONMENT, 4.

SPECIAL APPEALS.

See PRACTICE IN CIRCUIT COURTS, 3.

SPECIAL CONTRACTS.

See CONTRACTS, 1: DECLARATION, 4.

SPECIAL DAMAGES.

See HIGHWAYS, 1.

SPECIAL FINDING.

See PRACTICE IN SUPREME COURT, 3.

SPECIAL QUESTIONS TO THE JURY.

1. Special questions submitted to be propounded to the jury which are wholly inconclusive should be excluded.—*Frankenberg v. First National Bank of Decatur, 46.*
2. As to special questions to the jury, where a verdict is given for the party holding the affirmative of the question at issue,

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and the jury in answer to special questions submitted to them negative a fact, or say they are unable to find it, which the party holding the affirmative must establish in order to entitle him to a verdict, or if where a verdict is given for the other party, they find in answer to such questions facts sufficient to establish the issue, then in either case the special finding is inconsistent with the verdict, and will control it. —*Harbaugh v. Cicott*, 241.

3. Proper interrogatories upon particular questions of fact material to the issue, and involving legal consequences which would have a controlling force in reaching a conclusion, should upon request be submitted to the jury; and though the jury cannot be compelled to answer them, a failure to answer or find any affirmative fact essential to sustain the verdict will have the effect to nullify the verdict and result in a mistrial. —*Ibid.*
4. Where in an election controversy it was conceded the respondent by the official returns had a majority of one, and the relator sought to overcome this by showing that certain votes cast for the respondent were illegal, and the respondent in turn undertook to show that illegal votes were cast for the relator, it is held the parties had a right to have proper questions, proposed for the purpose of ascertaining whether certain alleged illegal voters voted, for whom they voted, and whether they were legally entitled to vote, submitted to the jury, and that their rejection was error.—*Ibid.*
5. The admission of a fact upon the trial does not preclude the opposite party from putting a special question requiring the jury specifically to find the fact.—*Ibid.*
6. It being shown that a certain person named, who was claimed to be an illegal voter, voted at a certain place, it was competent to ask the jury to find specially whether he was duly registered in that ward, since if duly registered he was *prima facie* entitled to vote.—*Ibid.*
7. It is not a valid objection to special questions to the jury as to whether a named person was "duly registered," or was a "legal voter," and "if not, why not," that it requires them to pass upon questions of law; the application of legal principles to the evidence in the case, and to draw conclusions therefrom, is not beyond the province of the jury.—*Ibid.*
8. Questions which are inconclusive, and which, no matter how answered, would not be inconsistent with the verdict, may properly be withheld from the jury.—*Ibid.*
9. The question of the wisdom or propriety of permitting special questions to be submitted to the jury, is one to be addressed, not to the courts, but to the legislature.—*Ibid.*
10. In an election controversy where the issue turned on the question whether illegal votes had been cast, evidence having

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been introduced of illegal votes on both sides, the answer of the jury to special questions, as to how many illegal votes were cast for each, that they do not know, is inconsistent with their general verdict against the party who had received according to the official returns the majority of the votes, and demonstrates that there has been a mistrial.—*Ibid.*

SPECIFIC FINDING.

See PRELIMINARY EXAMINATIONS, 1.

SPECIFIC PERFORMANCE.

1. An arrangement between a step-son just come of age and about to leave home and set up for himself, and his step-father, that if the former would stay with the latter and work the farm and take care of the family, he should have in consideration thereof a deed of one-half the farm, which is shown by the evidence to have been a distinct and definite agreement as to the land and the consideration, and not a mere vague expectation, is sustained and specifically enforced after a substantial performance of the consideration.—*Twiss v. George, 253.*
2. The fact that complainant, after conveyance of the land to a third person, brought attachment and levied on the land for such of his advances and expenditures as were not outlawed, where the attachment has since abated by the death of the defendant therein, will not avail as a bar to his bill, filed to set aside such conveyance on the ground that the grantee therein took as trustee subject to complainant's beneficial interest, at least not where such defense is not clearly and directly set up in the answer.—*Ibid.*
3. A vendee in a land contract could not be compelled on a bill for specific performance to accept a doubtful title unless the contract so specifies.—*Powell v. Conant, 396.*
4. Where a bill is brought against heirs of an estate for the specific performance of an oral contract made with their ancestor thirty years before, the delay must be excused by a very satisfactory showing of facts.—*Ritson v. Dodge, 463.*
5. Admissions by the alleged vendor, of an agreement to convey, coupled with an asserted intention not to convey because of an act of waste committed by the vendee, are not very satisfactory evidence of the contract; and such an announcement of his intention not to fulfill the contract makes more culpable the laches of a long delay by the vendee in bringing his action.—*Ibid.*
6. Work done in raising crops on wild land partially brought under imperfect cultivation is not very conclusive as evidence

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of possession under a contract of purchase, especially not where it is shown that the party was once dispossessed of his occupation and a part of his crop appropriated by the alleged vendor.—*Ibid.*

7. One whose claims as purchaser have been thus by actual dispossession distinctly denied must move promptly in the assertion of any rights he claims thereafter.—*Ibid.*
8. It is essential to the granting of relief by specific performance that the contract be clearly and satisfactorily established. —*Ibid.*
9. Where one has received the title of a purchaser upon a statutory foreclosure under an arrangement with the owner of the equity of redemption to give him further time to redeem or to purchase back, time is not so far of the essence of the contract as to prevent its enforcement upon equitable terms within a reasonable time after the lapse of the period specified.—*Moote v. Scriven, 500.*
10. And where the arrangement was to pay twelve and a half per cent. interest to cover original expenses and trouble, and the extra two and a half per cent. did not exceed $30, payment in accordance with this arrangement was imposed as terms of granting the relief sought.—*Ibid.*
11. A verbal agreement to advance money to purchase lands and to remove incumbrances on them, and ultimately to transfer them to another on re-payment, where the latter was all the time in possession, and did no act to his own prejudice which would amount to part performance, will not be specifically enforced in equity.—*Ibid.*

SPIRIT.

See CHARGE TO THE JURY, 1.

STATEMENTS.

See EVIDENCE, 17, 18, 27.

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SUFFERING.

See EVIDENCE, 5.

SUIT AT LAW.

See SPECIFIC PERFORMANCE, 2.

SUIT BROUGHT.

See INTEREST, 2.

SUNDAY LIQUOR LAW.

1. The term "closed" in the statute of 1875, providing that all saloons etc., and all places of public resort where intoxicating liquors are sold, shall be *closed* on Sundays, and between eleven and six in the night time, means at least that the sales shall be entirely stopped and the traffic shut off effectually, so that drinking, and the conveniences for drinking, shall be no longer accessible, and that those who frequent the places for that purpose shall be dispersed.—*Kurtz v. People*, *279*.
2. Provisions for the punishment of Sunday and night sales of liquors to persons not minors, drunken persons or habitual drunkards, in an act entitled one to prevent the sale or delivery of intoxicating liquors, etc., to minors, drunken persons and habitual drunkards, etc., do not come within the constitutional inhibition (*Art. IV., § 20*) that "no law shall embrace more than one object, which shall be expressed in its title." —*Ibid.*

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3. This provision of the constitution was intended to prevent legislators from being entrapped into the careless passage of bills on matters foreign to the ostensible purpose of the statute as entitled; but it is not designed to require the body of the act to be a mere repetition of the title, nor to preclude the introduction of such means as are reasonably adapted to secure the object indicated by the title.—*Ibid.*
4. The closing of saloons on Sundays and in the night is not so far foreign to the subject of preventing the sale of liquors to minors, drunken persons and habitual drunkards, as to authorize the courts to hold that the legislature are going beyond their province in acting upon the common sense assumption, that permitting drinking places to be kept open on Sundays and late at night is likely to induce or favor the tempting of youths and drunkards into drinking and intoxication.—*Ibid.*

SUPERINTENDENT.

See BUILDING CONTRACTS, 1, 2.

SUPERIOR COURT OF GRAND RAPIDS.

1. The superior court of Grand Rapids is a court of special and limited jurisdiction as to persons, and its jurisdiction, therefore, must be shown, and cannot be presumed.—*Denison v. Smith*, 155.
2. A municipal court created for a city would be an anomaly if it could send its process abroad for general purposes.—*Ibid.*
3. Under the statute (*Comp. L.*, § 5748), providing in the case of joint debtors for service of process of the circuit courts out of the county where one is served within it, an absent defendant cannot lawfully be pursued until service has been made and proved on some one of the joint defendants within the jurisdiction; this is a condition precedent; and the state of the record itself at the time of such foreign service must disclose a compliance with this condition. And the legal rules applying to service in such cases is expressly adopted as governing service beyond the city of the process of the superior court of Grand Rapids.—*Ibid.*
4. The phrase in the statute organizing the superior court of Grand Rapids, as to service made on a defendant "*in Kent county*," means outside the city of Grand Rapids; and a return showing only such service is equivalent to "not found" in the jurisdiction; and after such a return a co-defendant out of the jurisdiction is not bound to watch the records, and could not be affected by a subsequent amendment of the return, made *ex parte*, and still less could it be retroactive against him.—*Ibid.*

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SUPERIOR EQUITIES.

See FRAUD, 7.

SUPERSEDEAS.

See PRACTICE IN CIRCUIT COURTS, 5.

SUPERVISION OF STREETS.

See EJECTMENT, 4.

SUPERVISORS.

1. The constitutional provision (*Art. X. § 10*) conferring upon the board of supervisors "the exclusive power to prescribe and fix the compensation rendered for, and to adjust all claims against" a county, covers the claim of another county for the expenses of a criminal trial on a change of venue; and any action by the board of the claimant county, in auditing claims for such expenses, would be inoperative to bind the respondent county.—*Barry County v. Supervisors of Manistee County, 497.*
2. Where the supervisors of a county against which such a claim has been presented have taken action upon it under the erroneous supposition that a previous allowance by the board of the claimant county was binding, and afterwards rescinded such action and investigated the items and passed anew upon the claim, their later action will not be reversed by *mandamus*, in the absence of a clear showing that the claim as at first allowed by them was just and right.—*Ibid.*

See REMOVAL OF COUNTY SEAT, 1-4: TAXATION, 8-12: TAX-TITLES.

SUPPRESSION OF CRIMINAL PROCEEDINGS.

See PROMISSORY NOTES, 8, 9.

SURETIES.

See AGENCY, 3: EQUITY JURISPRUDENCE, 4-6: FRAUD, 4: GUARANTY, 1-8.

SUSPENDED SENTENCE.

Where upon a plea of guilty to a charge of malicious injury to a dwelling, sentence has been suspended by the trial judge until the next term, and the prisoner let to go on his own recognizance in a merely nominal sum, and the subsequent term has passed without any further steps being taken, it is

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not competent for another judge, holding the court temporarily, to sentence such offender to imprisonment in the state prison; such action is to be considered not merely as supplying the trial judge's omissions, but as practically overruling his decision.—*Weaver v. People*, *296*.

SWAMP LANDS.

1. It is against the policy of the law to permit the question whether specific lands are reserved or not under the statute (*Comp. L. 1871*, § *3959*) providing for the reservation of lands selected by state road contractors, to be left open to private arrangement or to parol evidence.—*Newcombe v. Chesebrough*, *321*.
2. The board of control, however, are given by the statute broad powers for extending the time for completing any contract, and as the statute expressly provides for the reservation of lands selected by such contractors to apply on their contracts "during the full time specified in said contracts for the completion thereof," any extension lawfully authorized by the board would become the "time specified," and the reserve would continue during that period.—*Ibid.*
3. But the time "specified in the contract" cannot be made to include any period not within the original contract or some authorized extension.—*Ibid.*
4. The action of a board of several persons must be determined by their votes, as evidenced by their record; their action separately amounts to nothing; and their joint action must be evidenced in some way as the action of a lawful majority; and it requires affirmative action to create a term of "time specified."—*Ibid.*
5. During any interval that may elapse between the expiration of the original time specified in the contract and any subsequent renewal or extension thereof, there would exist no valid reservation in favor of the contractor; and where during such interval the lands have been lawfully patented to others, the board of control cannot, by afterwards renewing the contract, take away the rights thus vested in such patentees, although such renewal would bind the state to pay for the work.—*Ibid.*

TAXATION.

1. It is not a valid objection to a tax-roll that the figures indicating the valuation of property on the roll are not preceded by a dollar-mark; and especially not where the tax is properly carried out with the dollar-mark preceding it.—*Bird v. Perkins*, *28*.

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2. The tax-roll and the assessor's certificate are distinct things; and it will not be presumed that because the copy of the roll upon which the tax is extended has no certificate copied upon it, the original roll was not properly authenticated.—*Ibid.*
3. The description of land on a village tax-roll as the east half of the southeast quarter of a section, omitting to give the number of the section, is not so defective as to be void when the village contains but one east half of a southeast quarter of a section.—*Ibid.*
4. The fact that a new warrant was issued after the original had been extended, and before the period of the extension had expired, where both were attached to the tax-roll in defendant's hands, could not detract from the protective force of the process, since if either warrant was valid it was sufficient for defendant's protection:—*Ibid.*
5. A tax collector is protected by process that is fair on its face against any illegalities except his own.—*Ibid.*
6. A tax collector does not become a trespasser *ab initio* by keeping a horse he has levied upon a little longer than is absolutely necessary to giving notice and making sale; and if the keeping be lawful, the expense is a lawful charge, but if not, the owner in a proper action may recover the excess. —*Ibid.*
7. The defendant is not to be held chargeable, by reason of his having been a member of the village board when the tax was levied, with notice of illegalities.—*Ibid.*
8. It is not within the scope of resolutions of a board of supervisors authorizing a supervisor to make a new roll in pursuance of the statute (*Comp. L. 1871, § 1004*), to sanction an alteration simply of an existing collection roll which had previously, in due course of law, been delivered to the treasurer for collection, by drawing a pen across the figures therein and inserting other figures in lieu thereof.—*Ferton v. Feller, 199.*
9. A seizure of chattels to satisfy the amount set opposite a tax payer's name on a collection roll, which had been thus without authority of law changed after the roll with the warrant attached had been in due course passed over to the treasurer for collection, is held not justifiable; and it is immaterial that by the change the amount was made less instead of greater.—*Ibid.*
10. The power of the supervisor over the collection roll terminates when in regular course it has passed into the hands of the treasurer for collection; and any act of his thereafter in altering the roll is not an official one, but private and personal.—*Ibid.*

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11. It is essential that the collection roll and the original on file in the supervisor's office should correspond; and no lawful change can be made in the former unless sanctioned by the state of the latter, or so as to cause a substantial variance between the two.—*Ibid.*
12. The errors committed here are not cured by the statute (*Comp. L. 1871, § 1129*) providing that taxes shall not be held invalid for formal defects not affecting the merits; the seizure in question being not for a tax, but upon items inserted in the roll unofficially and without authority of law.—*Ibid.*

See COMMON COUNCIL: EVIDENCE, 2: MANDAMUS, 1: MUNICIPAL BOARDS, 3: TAX LEASE: TAX LIENS: TAX TITLES.

TAXATION OF COSTS.

See PRACTICE IN SUPREME COURT, 2.

TAX COLLECTOR.

See TAXATION, 5–7.

TAX LEASE.

The term of a Detroit city tax-lease should begin from the time when redemption expired, and not from the date of the tax-sale.—*Murphy v. Campau, 71.*

TAX-LIENS.

It is a complete defense to a claim for a recovery under the statute (*Comp. L. 1871, § 1131*) as for a lien for taxes, that the right of the claimant has been extinguished by subsequent tax sales.—*Robbins v. Barron, 124.*

TAX-ROLL.

See TAXATION, 1–5, 8–12.

TAX TITLES.

A tax deed given upon a sale which included township and school taxes is not rendered invalid by a showing that the board of supervisors did not direct any taxes for township or school purposes to be assessed in the township for that year.—*Robbins v. Barron, 124.*

See TAX-LIENS.

TEMPORARY ABSENCE.

See ELECTIONS, 4.

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TENANCY.

See LANDLORD AND TENANT.

TERM.

See TAX LEASE.

TERMS.

See SPECIFIC PERFORMANCE, 10.

TESTIMONY OF SINGLE WITNESS.

See CHARGE TO THE JURY, 4.

TESTIMONY TAKEN IN OPEN COURT.

See EQUITY PLEADING AND PRACTICE, 16: PRACTICE IN SUPREME COURT, 4.

THREATS.

See EVIDENCE, 36.

TIMBER.

See LAND CONTRACTS: TROVER, 1.

TIME.

See CHATTEL MORTGAGES: CRIMINAL COMPLAINTS, 2, 3: INFORMATIONS, 2, 3: INTEREST, 1, 2: SEDUCTION, 12: SPECIFIC PERFORMANCE, 9: SWAMP LANDS, 2–4: TAX LEASE.

TITLE.

See CONTRACTS, 4: DEEDS, 4: EJECTMENT, 3, 4: EQUITY JURISPRUDENCE, 8–10: ESTOPPEL, 1: RECITALS, 1, 2: REPLEVIN, 6: SALES OF GOODS, 7–9: TROVER, 2.

TITLES OF ACTS.

See SUNDAY LIQUOR LAW, 2–4.

TORTS.

See CORPORATIONS, 3, 7, 8.

TOWNS.

See ADJOINING PROPRIETORS, 4: LIQUOR TAX, 1: TOWN TREASURER.

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TOWNSHIP TAXES.

See TAX TITLES.

TOWN TREASURER.

Where one who has been elected town treasurer is, during his term, by an act of the legislature detaching from the township and annexing to an adjoining city the territory within which such officer resides, placed outside the town limits, and the town board thereupon appoint another town treasurer in his place, such prior officer is not thereafter entitled to demand and receive of the county treasurer moneys in his hands belonging to the township.—*Youngblood v. Stellwagen*, 1.

TRANSCRIPT.

See EQUITY PLEADING AND PRACTICE, 16: JUDGMENT, 4.

TRANSFEREES.

See EXEMPTIONS, 1.

TRANSFER OF TITLE.

See SALES OF GOODS, 7–9.

TRANSPORTING FREIGHT.

See RAILROADS, 1–5.

TREASURER.

See TOWN TREASURER.

TRESPASS.

See ADJOINING PROPRIETORS, 1: TAXATION, 5, 6.

TRIALS.

See PRELIMINARY EXAMINATIONS, 2.

TROVER.

1. In an action of trover for the conversion of timber by cutting the same by mistake and without willful wrong from the lands of another in Michigan and transporting them to Toledo, Ohio, the value of the timber standing being $1 50 per thousand, and the cost of cutting, hauling, running, booming, rafting and towing to Toledo amounting to upwards of $9, and the value there $12, a ruling fixing the measure of damages at either the value where taken, together with the

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profits which might have been derived from its value in the ordinary market, or the market value at Toledo, less the sum expended by defendants in bringing it there and putting it in condition for sale, with interest from the date of the conversion, is sustained:—MARSTON, J., with whom COOLEY, CH. J., concurred, holding that in the absence of fraud, violence, or willful negligence or wrong, the proper measure of damages generally in trover, as in other like actions, is such a sum as will afford compensation for the actual injury sustained, and that the ruling in question was correct as a general principle in cases where exemplary or punitory damages were not admissible:—GRAVES, J., concurring in the result; and CAMPBELL, J., concurring in affirming the judgment upon the ground that the conversion is set forth in the declaration as having occurred in Michigan, and that the only conversion shown to have taken place in Michigan was the original taking and removal of the logs.—*Winchester v. Craig, 205.*

2. Recovery in trover puts an end to any right of the plaintiff therein to reclaim the property, and leaves the title in those at whose instance and for whose benefit the conversion was brought about.—*Kenyon v. Woodruff, 310.*

3. A recovery and execution levy against one of several who were jointly guilty of conversion, precludes recourse against the others on account of the same conversion; the principle as to joint trespassers being applicable.—*Ibid.*

See EVIDENCE, 2, 3: FRAUD, 5.

TRUSTEE.

See CHANCERY SALES, 3, 4.

TRUSTS.

See FRAUD, 8–11.

UNAUTHORIZED ACTS.

See AGENCY, 2.

UNAUTHORIZED DELIVERY.

See MORTGAGES, 4–6.

UNCERTAIN EVENT.

See INTEREST, 2.

UNCERTAINTY.

See EQUITY JURISPRUDENCE, 11.

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UNLAWFUL PURCHASES.

See SET-OFF.

UNLAWFUL SEIZURES.

See CHATTEL MORTGAGES: TAXATION, 9.

UNLAWFUL TAKING.

See RESCUE, 2.

USE AND OCCUPATION.

See CONTRACTS, 9.

VACANCY.

See CORPORATIONS, 1: TOWN TREASURER.

VAGUE EXPECTATION.

See SPECIFIC PERFORMANCE, 1.

VALUATION.

See TAXATION, 1.

VALUE.

See EVIDENCE, 16: TROVER.

VARIANCE.

See GUARANTY, 4, 5: INFORMATIONS, 3: PRACTICE IN SUPREME COURT, 8: TAXATION, 11.

VENDEE.

Assuming to pay mortgage: See DEEDS, 1-5.

VENDOR'S INTEREST.

See EXECUTION LEVY, 1.

VERDICT.

Where, upon the trial of one charged with an assault with intent to commit murder, the jury brought in a written verdict finding the prisoner guilty of an assault with intent to kill, as charged, but that the shooting was done under great provocation, and recommending the prisoner to the mercy of the court, it was held that there being no such offense under our statutes as assault with intent to kill, the statu-

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tory offense being assault with intent to commit the crime of murder, the verdict cannot be construed as a finding that defendant was guilty of any thing more than an assault and battery, and that a sentence to imprisonment for seven years was unauthorized.—*Wright v. People*, 300.

See EMPLOYMENT: PRACTICE IN SUPREME COURT, 1: SPECIAL QUESTIONS TO JURY, 2–10.

VESTED RIGHTS.

See SWAMP LANDS, 5.

VEXATION.

See PRACTICE IN SUPREME COURT, 13.

VICARIOUS SERVICE.

See GARNISHEE PROCEEDINGS, 5: SERVICE OF PROCESS, 4.

VILLAGES.

See EQUITY JURISPRUDENCE, 1–3: EVIDENCE, 2, 3: LIQUOR TAX, 1: ORDINANCES: TAXATION, 3: WARRANT.

VIOLATIONS OF ORDINANCES.

See EQUITY JURISPRUDENCE, 1–3.

VIOLENCE.

See RESCUE, 2.

VOID APPOINTMENT.

Of receiver: See EQUITY PLEADING AND PRACTICE, 11, 12.

VOID CONDITION.

See WILLS, 3.

VOLUNTARY CONVEYANCES.

See DEEDS OF GIFT, 1, 2.

VOLUNTARY SUBSCRIPTIONS.

1. Where a party promises to contribute in aid of a proposed railroad, it would be implied as a condition, in the absence of express conditions, that the road should be constructed and operated; and upon this being done within a reasonable time, where no time was fixed, the promise would become operative and binding, and the party making it could not thereafter repudiate it.—*Stevens v. Corbitt*, 458.

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2. The fact that a company was organized to build the road, at the time the promise was made, or that even in the absence of such a promise the road would have been built, would not defeat the promise.—*Ibid.*
3. Where such a promise is made to some one necessarily connected with or interested in the work being done, for the benefit of the company that has begun, or is about to undertake the work, then, upon completion of the work, or upon the performance of the conditions upon which the promise was made, the liability of the promisor becomes complete; there are also cases where expense is incurred or an obligation created under the promise, where a like liability would follow.—*Ibid.*
4. In all such cases the fair inference is, that the work was done or the expense or liability incurred in reliance upon the subscription or promise.—*Ibid.*
5. Voluntary subscriptions in aid of a proposed railroad, when accepted and the road completed in accordance with the conditions of the promise, become valid and binding contracts.—*Mich. Midland & Canada R. R. Co. v. Bacon*, 466.
6. Where the promise is to an existing company, its successors or assigns, the completion of the road by its successor, to whom it had assigned all its franchises and property, including such subscription, will enable the latter to enforce the promise in its own name; the building and opening of the road is the essence of the agreement.—*Ibid.*
7. Though there might be such a change in the location of the line of the road as would warrant the person making the promise in withdrawing it, where it would be apparent that he would lose the advantages which he expected to accrue to him from the building of the road, the evidence in this case in that regard did not make out a valid defense on that ground.—*Ibid.*

See INTEREST, 1, 2.

VOTERS.

See ELECTIONS, 1-4: SPECIAL QUESTIONS TO JURY, 4, 6-10.

VOTES.

See EVIDENCE, 24: SWAMP LANDS, 4.

WAIVER.

The defendant, by pleading to the information, waives all objection on the ground that as but one offense was charged in the warrant no other offense could be set forth in the information.—*People v. Clark*, 112.

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See BUILDING CONTRACTS, 6: EXECUTION SALES, 2: GARNISHEE PROCEEDINGS, 6: PRACTICE IN CIRCUIT COURTS, 7: REPLEVIN, 4.

WANT OF CONSIDERATION.

See PROMISSORY NOTES, 4.

WARRANT.

Under a village charter contemplating process for the arrest of one charged with rescuing impounded animals substantially like the warrant of arrest for offenses triable by justices of the peace, a warrant commanding the officer to arrest the person named and bring her before the justice to answer a complaint filed against her, etc., "in a plea of debt for the penalty to their damage of fifty dollars," etc., is not regular. —*Sheldon v. Hill*, 171.

See ARRAIGNMENT: CRIMINAL COMPLAINTS, 2: SEDUCTION, 12: TAXATION, 4, 5: WAIVER.

WARRANTY DEED.

See ESTOPPEL, 3.

WATER.

See ADJOINING PROPRIETORS, 1–6: EVIDENCE, 21–23.

WATER COMMISSIONERS.

See MANDAMUS, 1: MUNICIPAL BOARDS, 1–3.

WEIGHT OF EVIDENCE.

The weight of the evidence is a matter for the consideration of the jury only.—*Sebright v. Moore*, 92.

See FINDING OF FACTS, 1: PRACTICE IN SUPREME COURT, 1, 3, 11.

WIFE.

See DEEDS OF GIFT, 1, 2: DIVORCE: EVIDENCE, 27: EXEMPTIONS, 2: FRAUD, 6–11: REPLEVIN, 7, 8.

WIFE'S ACKNOWLEDGMENT.

See EVIDENCE, 11.

WILD LAND.

See SPECIFIC PERFORMANCE, 6.

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WILLFUL WRONG.

See EXEMPLARY DAMAGES, 1, 2.

WILLS.

1. A condition annexed to a devise to a married woman, that she shall not live with her husband, is in violation of public policy, and void.—*Conrad v. Long, 78.*
2. In a devise to a married woman "upon this condition: if at any time subsequent she should conclude not to live with her present husband as his wife, but if she continue so to live as the wife of said husband until her death," then over to another, it is held there is nothing in the nature of a condition precedent.—*Ibid.*
3. The condition being void, the devisee takes an estate clear of conditions.—*Ibid.*

See FRAUD, 8–11.

WITNESSES.

See CHARGE TO THE JURY, 4: EVIDENCE, 6, 7.

WORDS.

See EVIDENCE, 34.

WORDS ACTIONABLE PER SE.

See SLANDER.

WORK AND LABOR.

See DECLARATION, 4.

WRIT OF ERROR.

See CERTIORARI, 1: PRACTICE IN CIRCUIT COURTS, 5: PRACTICE IN SUPREME COURT, 2.

WRITTEN AGREEMENTS.

See CONTRACTS, 2: GUARANTY, 8.

WRITTEN INSTRUMENTS.

See EVIDENCE, 29.

WRITTEN VERDICT.

See VERDICT.

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WRONG-DOER.

See REPLEVIN, 8.

WRONGFUL ACTS.

See ADJOINING PROPRIETORS, 1.

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